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15 December 2016

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Nicholson, Matthew (2017) 'Psychoanalyzing international law(yers).', German law journal., 18 (3). pp. 441-510.

Further information on publisher's website:

<http://www.germanlawjournal.com/>

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PSYCHOANALYZING INTERNATIONAL LAW(YERS)

[Author name and biographical footnote to be inserted here after peer review]

Abstract

This article reads the work of Martti Koskenniemi – arguably the most significant international legal thinker of the post-Cold War era – as an exercise in (Lacanian) psychoanalysis. Excavating the links between Koskenniemi and French psychoanalyst Jacques Lacan, and analysing the origins of those links in Koskenniemi's debt to the Harvard branch of the American Critical Legal Studies ('CLS') movement, it argues that over almost thirty years Koskenniemi has employed psychoanalytic techniques to re-build the self-confidence of international law(yers).

The success of this confidence-building project explains the acclaim Koskenniemi's work enjoys. As international law's psychoanalyst he has defined the identity of the international lawyer and mapped the structure of international legal argument, stabilising international law's present reality by synchronising it with narratives of its past. Any attempt to destabilise that reality or depart from present structures into an alternative future must start from an analysis of Koskenniemi's methods and it is in this sense, and not out of a more pure interest in Koskenniemi's work, that this article deconstructs Koskenniemi's oeuvre. It situates his method, reveals his choices and explores their limits in an effort to develop (tentative) proposals for a "new" international law(yer) and an international legal future outside the structure that Koskenniemi has mapped so effectively and affectively.

[A] genuine critique of structuralism commits us to working our way completely through it so as to emerge . . . into some wholly different and theoretically more satisfying philosophical perspective.¹

"le nom-du-père" / "le non du père" / "les non-dupes errant" . . . those who think that they are not duped err.²

"those who are not taken in err"³

¹ FREDRIC JAMESON, THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM vii (1972).

² PAUL VERHAEGHE, ON BEING NORMAL AND OTHER DISORDERS: A MANUAL FOR CLINICAL PSYCHODIAGNOSTICS 68 (footnote 37) (2008) (quoting JACQUES LACAN, LE SÉMINAIRES LIVRE XVII: L'ENVERS DE LA PSYCHOANALYSE (1991)).

³ SLAVOJ ŽIŽEK, LESS THAN NOTHING: HEGEL AND THE SHADOW OF DIALECTICAL MATERIALISM 969 (2012) (quoting and translating NICOLAS FLEURY, LE RÉEL INSENSÉ: INTRODUCTION À LA PENSÉE DE JACQUES-ALAIN MILLER 93-94 (2010)).

A. Introduction

Martti Koskenniemi is perhaps the most significant international legal thinker of recent times. His first book, *From Apology to Utopia*,⁴ has been described as “the most significant late 20th century English language monograph in the field of international law,”⁵ his second, *Gentle Civilizer*,⁶ has been credited with “trigger[ing] a ‘historiographical turn’ in the discipline of international law,”⁷ and no textbook is complete without a section on Koskenniemi’s work.⁸ Widely regarded as having defined and explained the structure of international law and the identity of the international lawyer in the post-Cold War era,⁹ he has virtually unrivalled influence over international legal discourse.¹⁰ Whilst *From Apology* is the standard reference on international legal theory,¹¹ Koskenniemi’s work extends beyond theory and into international legal practice.¹² This is reflected in his leadership of the final stages of the International Law Commission’s (‘ILC’) important work on fragmentation, perhaps the most significant challenge to the coherence of international legal order in modern times.¹³

⁴ MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT – REISSUE WITH NEW EPILOGUE* (2005) (originally published in 1989).

⁵ David Kennedy, *The Last Treatise: Project and Person*, 7(12) GERMAN L.J. 982, 982 (2006). See also Jean d’Aspremont, *Martti Koskenniemi, the Mainstream, and Self-Reflectivity*, 29 LEIDEN J. INT’L L. 625 (2016) (on the evolution of the response to *From Apology* and its central role in recent debates about international legal theory).

⁶ MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001).

⁷ Bardo Fassbender and Anne Peters, *Introduction: Towards a Global History of International Law*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 1, 23 (Bardo Fassbender and Anne Peters eds., 2012).

⁸ See, e.g., JAN KLABBERS, *INTERNATIONAL LAW* 13 (Cambridge Univ. Press, 2013); MALCOLM SHAW, *INTERNATIONAL LAW* 45-46 (7d ed., Cambridge Univ. Press 2014); MARTIN DIXON, ROBERT MCCORQUODALE & SARAH WILLIAMS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 12, 16 (5d ed., 2011) (extract from KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, and web post by Koskenniemi); ANDREW CLAPHAM, *BRIERLY’S LAW OF NATIONS* xii (2d ed., 2012) (“Although legal methods may . . . vary, understanding the deeper structures and the legal labels used to explain them is essential to seeing how international law works” (footnote, referencing the whole of KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, omitted)).

⁹ See Deborah Z Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT’L L. 341, 342 (1996) (observing “post Cold War confidence in international law has been replaced by a muted anxiety about its limitations”); *id.* at 360, 383 (on Koskenniemi’s response to the “anxiety” identified at 342); David Kennedy, *The Last Treatise*, *supra* note 5, at 990 (“He has opened up the field’s professional practices for [political] contestation”); Jason A. Beckett, *Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project*, 7(12) GERMAN L.J. 1045, 1045 (2006) (“Few books have attained the influence and impact of Martti Koskenniemi’s *From Apology to Utopia*”).

¹⁰ Koskenniemi is, for example, a contributor to many of the most significant edited collections. See, e.g., Martti Koskenniemi, *Projects of World Community*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 3 (Antonio Cassese ed., 2012); Martti Koskenniemi, *A History of International Law Histories*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 943 (Bardo Fassbender and Anne Peters eds., 2012); Martti Koskenniemi, *Transformations of Natural Law: Germany 1648-1815*, in *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* 59 (Anne Orford and Florian Hoffmann eds., 2016).

¹¹ See David Kennedy, *The Last Treatise*, *supra* note 5, at 982 (“Martti Koskenniemi’s *From Apology to Utopia* is the most significant late twentieth century English language monograph in the field of international law . . . it could well turn out to have been the last great original treatise in the international law field”); Mario Prost, *Born Again Lawyer: FATU as An Antidote to the “Positivist Blues”*, 7(12) GERMAN L.J. 1037, 1037 (2006) (“[*From Apology*] might very well have been the single most influential book of the last 15 years in the field of international legal theory”).

¹² See Martti Koskenniemi’s CV, http://www.helsinki.fi/eci/Staff/Koskenniemi_CV.pdf (last visited July 28 2016) (on Koskenniemi’s practice experience).

¹³ See Anne-Charlotte Martineau, *The rhetoric of fragmentation: fear and faith in international law*, 22 LEIDEN J. INT’L L. 1 (2009); Gerhard Hafner, *Risks Ensuing from Fragmentation of International Law*, U.N. GAOR, 55th Sess., Supp. No. 10, Annex, at 143. UN. Doc. A/55/10 (2000); Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 TEMPLE INT’L & COMP. L.J. 279 (2016); Sean D. Murphy, *Deconstructing Fragmentation: Koskenniemi’s 2006 ILC Project*, 27 TEMPLE INT’L & COMP. L.J. 293 (2016). See also Akbar Rasulov, *From Apology to Utopia and the Inner Life of International Law*, 29 LEIDEN J. INT’L L. 641, 646 (2016), commenting, in terms that seem to capture the relationship between Koskenniemi’s fragmentation work and his work more generally, for all that Rasulov himself does not make this connection: “[w]hat the author of [*From Apology*] recognized from the very outset . . . was that the key to winning any kind of intra-disciplinary theoretical struggles in modern international law lies in producing not just a new set of critical-theoretical ideas accessible primarily to professional legal academics, but a new system of intellectual tools and concepts accessible above all to the community of international legal practitioners: a system of tools and concepts which the practising lawyers could use to describe and express their day-to-day professional experiences and anxieties.”

This article reads Koskenniemi's work as an exercise in Lacanian psychoanalysis; an application of Jacques Lacan's psychoanalytic theory to international law and international lawyers.¹⁴ Casting Koskenniemi as Lacanian analyst and international law(yers) as analysand or patient, it treats Koskenniemi's psychoanalysis as a process which "enable[s]" the patient to "get over itself",¹⁵ a course of therapy which "enable[s]" the patient to recognise and live with(in) his neurosis by accepting that it cannot be "cure[d]".¹⁶

The argument develops in three parts. The first (Diagnosis) excavates the Lacanian foundations of Koskenniemi's work, the second (Therapy) links Koskenniemi's work and Ernesto Laclau's political theory, and the third (Prognosis) considers the patient's health and prospects after therapy.

Psychoanalysis has, I argue, given the patient a modern, elitist self-confidence, inuring it to the injustices of global postmodernity.¹⁷ The patient needs "new codes,"¹⁸ specifically, new historical-materialist codes,¹⁹ through which to re-image itself and engage with global postmodernity,²⁰ because:

[o]ur [postmodern] social order is richer in information and more literate, and socially, at least, more 'democratic' in the sense of the universalization of wage labor . . . [and] this new order no longer needs prophets and seers of the high modernist and charismatic type, whether among its cultural producers . . . its politicians²¹

or, indeed, its international lawyers.²²

It is important to be clear about the nature and extent of the claims I am making about Koskenniemi's work. In *reading* Koskenniemi's work as a psychoanalysis of international law(yers) I am not claiming that it *is* a psychoanalysis of international law(yers), nor that this is the only viable reading. I am, however, claiming that

¹⁴ See COSTAS DOUZINAS, THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY 297-318 (2000) (on the relevance of Lacanian psychoanalysis to the study of law); David S. Caudill, *Freud and Critical-Legal Studies: Contours of Radical Socio-Legal Psychoanalysis*, 66 INDIANA L.J. 651, 669-74 (1990-1991) (on Lacanian psychoanalysis and law); Anthony Carty, *Language Games of International Law: Koskenniemi as the Discipline's Wittgenstein*, 13 MELBOURNE J. INT'L L. 859, 867 (2012) (suggesting that Koskenniemi's 1999 text, *Between Commitment and Cynicism*, *infra* note 90, "provide[s] a window . . . into the psychological state of the profession"); Sahib Singh, *The Critic(al Subject)*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2648277> (last visited September 5 2016), at 3 (noting that "smatterings of psychoanalytic [theory] . . . undergird *From Apology to Utopia*"); Maria Aristodemou, *A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours*, (2014) EUR. J. INT'L L. 35 (2014) (applying Lacanian psychoanalysis to the study of international legal theory).

¹⁵ Aristodemou, *supra* note 14, at 37.

¹⁶ *Id.* ("the message from the (nasty) Lacanian analyst is not to cure the patient's ego and return it to her well adjusted to reality – in other words, not to strengthen and perpetuate international law's self-delusions but to lead it, kicking and screaming no doubt, to finding out the bloody histories that constituted it as a subject and enable it, in short, to 'get over itself'"). See also, in the context of international criminal law, and with reference to Koskenniemi's work, Frédéric Mégret, *The Anxieties of International Criminal Justice*, 29(1) LEIDEN J. INT'L L. 197 (2016).

¹⁷ See FREDRIC JAMESON, POSTMODERNISM OR, THE CULTURAL LOGIC OF LATE CAPITALISM 2 (1991) ("the prophetic elitism and authoritarianism of the modern movement [in architecture] are remorselessly identified with the charismatic Master"); David Kennedy, *Apology to Utopia: The Structure of International Legal Argument*, 31 HARVARD J. INT'L L. 385, 387 (1990) ("[Koskenniemi] seems determined to narrate his discipline to its end – to write the last modern book on public international law").

¹⁸ JAMESON, POSTMODERNISM, *supra* note 17, at 394.

¹⁹ See Carty, *supra* note 14, at 865 (advocating "a phenomenological posture vis-à-vis reality for which new languages need to be found").

²⁰ See Matthew Nicholson, *Walter Benjamin and the Re-Imagination of International Law*, 27 LAW AND CRITIQUE 103 (2016).

²¹ JAMESON, POSTMODERNISM, *supra* note 17, at 306.

²² See Balakrishnan Rajagopal, *Martti Koskenniemi's From Apology to Utopia: A Reflection*, 7(12) GERMAN L.J. 1089, 1091 (2006) ("while I agree wholeheartedly [with Koskenniemi] that international law is what international lawyers make of it, I am not sure that there is a clear consensus that all practitioners need to be international lawyers, especially in the post-modern world of the early 21st century when international law-talk is occurring at the popular level").

Koskenniemi's work can and should be read as a Lacanian psychoanalysis,²³ and that this reading provides the basis for re-thinking international law's present and future.

Recasting these claims in the language of Fredric Jameson's *The Political Unconscious*,²⁴ this article presents Lacanian psychoanalysis as the "hidden master narrative" of Koskenniemi's work,²⁵ the "allegorical key" that unlocks and reveals the relationship between its "multiple meanings,"²⁶ "unmask[ing]" his texts as "socially symbolic acts,"²⁷ therapeutic exercises that have "enable[d]" international law to "get over itself."²⁸ It is in this sense, and whilst recognising that my reading is not the only reading, that I argue for its "priority":²⁹

[I]t projects a rival hermeneutic to those already enumerated . . . not so much by repudiating their findings as by arguing its ultimate philosophical and methodological priority over more specialized interpretive codes whose insights are strategically limited as much by their own situational origins as by the narrow or local ways in which they construe or construct their objects of study.³⁰

B. DIAGNOSIS

I. Myth and Neurosis

The opening page of Koskenniemi's *From Apology to Utopia: The Structure of International Legal Argument*, published in 1989 and reissued in 2005, diagnoses international law's neurosis:

Lawyers seem to have despaired over seeing their specific methodology and subject-matter vanish altogether if popular calls for sociological or political analyses are taken seriously. Ultimately, they believe, there is room for a specifically 'legal' discourse between the sociological

²³ See Caudill, *supra* note 14, at 654 ("My thesis is that psychoanalytic theory offers insights with which to confront some of the problematic aspects of CLS [critical legal studies] – insights that are already contained within the radical traditions on which CLS draws").

²⁴ FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* (1981). See Matthew Nicholson, *The Political Unconscious of the English Foreign Act of State and Non-Justiciability Doctrine(s)*, 64(4) INT'L & COMP. L.Q. 743 (2015) (using Jameson's concept of the "political unconscious" in legal analysis).

²⁵ JAMESON, *POLITICAL UNCONSCIOUS*, *supra* note 24, at 13.

²⁶ *Id.* See also *id.* at 14 ("Allegory is . . . the opening up of the text to multiple meanings, to successive rewritings and overwritings which are generated as so many levels and as so many supplementary interpretations"); Paavo Kotiaho, *A Return to Koskenniemi, or the Disconcerting Co-optation of Rupture*, 7(12) GERMAN L.J. 484, 485 (2006) (noting a "contradiction between the appearance and essence of Koskenniemi's work").

²⁷ JAMESON, *POLITICAL UNCONSCIOUS*, *supra* note 24, at 5 ("The assertion of a political unconscious proposes that we . . . explore the multiple paths that lead to the unmasking of cultural artifacts as socially symbolic acts").

²⁸ Aristodemou, *supra* note 14, at 37.

²⁹ The most compelling readings of Koskenniemi's work in the literature, over which I claim this psychoanalytic reading has "priority", are Beckett, *supra* note 9 (critiquing what Beckett sees as inconsistencies in Koskenniemi's work); Rasulov, *supra* note 13 (focussing on the importance of "Kelsenian legal positivism" and "Saussurean structuralist semiotics" in *FROM APOLOGY*, *supra* note 4. *Id.* at 641); Justin Desautels-Stein, *Chiastic law in the crystal ball: exploring legal formalism and its alternative futures*, 2 LONDON R. INT'L L. 263 (2014) (reading Koskenniemi through the work of Søren Kierkegaard); Sahib Singh, *Koskenniemi's Images of the International Lawyer*, 29 LEIDEN J. INT'L L. 699 (2016) (reading Koskenniemi through the work of Jean-Paul Sartre); Singh, *The Critic(al Subject)*, *supra* note 14 (again reading Koskenniemi through the work of Jean-Paul Sartre); John Haskell, *From Apology to Utopia's Conditions of Possibility*, 29 LEIDEN J. INT'L L. 667 (2016) (focussing on the historical aspects of *FROM APOLOGY*, *supra* note 4). Where relevant, in footnotes *infra* I explain how my reading relates to the alternative readings offered by these authors.

³⁰ JAMESON, *POLITICAL UNCONSCIOUS*, *supra* note 24, at 5. See *id.* at x (on Marxist literary interpretation); See also Rasulov, *supra* note 13, at 642 (advancing an argument with a similar intention – "excavating [*From Apology*] from beneath the mountain of misreadings and misrememberings under which it has come to be so unceremoniously buried over the last quarter-century", *id.* – which also draws on Jameson's *POLITICAL UNCONSCIOUS*); Singh, *The Critic(al Subject)*, *supra* note 14, at 6 (footnote 28) (making a passing reference to Jameson's *POLITICAL UNCONSCIOUS*).

and the political . . . and that this is the sphere in which lawyers must move if they wish to maintain their professional identity as something other than social or moral theorists.³¹

Koskenniemi rejects the possibility of a “specifically ‘legal’ discourse” as a response to the threat from “sociological or political analyses.” “The structure of international legal argument” is defined by the “dynamics of [the] contradiction” between “normativity” and “concreteness”;³² there is no way out:³³

A law which would lack distance from State behaviour will or interest would amount to a non-normative apology, a mere sociological description [“concreteness”]. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way [“normativity”].³⁴

“Concreteness” and “normativity” are “criteria” for legal “objectivity”,³⁵ prerequisites for an international law that exists “independently of what anyone might think that the law should be” and “appli[es] even against a State (or other legal subject) which opposed its application to itself.”³⁶ The lesson of *From Apology*’s chapters two to six, covering fundamental and diverse topics such as sovereignty, the sources of international law and the interpretation of treaties, is that “the structure of international legal discourse on *all* doctrinal spheres undermine[s] the objectivity on which it constructed itself,”³⁷ that “law is constantly lapsing into what seems like factual description or political prescription.”³⁸

“[T]he legal mind [therefore] fights a battle on two fronts,”³⁹ trapped between “‘descending’ and ‘ascending’ patterns of justification,” the former “premised on the assumption that a normative code overrides individual State behaviour,” the latter “on the assumption that State behaviour, will and interest are determining of the law.”⁴⁰ “[T]here is [ultimately] no real discourse going on within legal argument . . . but only a patterned exchange of argument” between the two “patterns.”⁴¹ International law does not, therefore, exist *in* a “specifically ‘legal’ discourse” situated “between the sociological and the political,”⁴² but *as* an oscillation “between the sociological and the political.”⁴³

The anthropologist Claude Levi-Strauss, following Sigmund Freud’s work on psychoanalysis, recognised that “two traumas . . . are necessary in order to generate the individual myth in which a neurosis consists.”⁴⁴ It is

³¹ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 1.

³² *Id.* at 58 (sub-heading 1.3), 17.

³³ *See id.* at 16 (“intellectual operations [which seek to distinguish international law from the sociological and the political] do not leave room for any specifically legal discourse”).

³⁴ *Id.* at 17.

³⁵ *Id.* at 513.

³⁶ *Id.*

³⁷ *Id.* at 515.

³⁸ *Id.* at 16.

³⁹ *Id.*

⁴⁰ *Id.* at 59.

⁴¹ *Id.* at 511-12.

⁴² *Id.* at 1.

⁴³ *Id.* *See also id.* at 65 (“doctrine is forced to maintain itself in constant movement from emphasizing concreteness to emphasizing normativity and vice versa without being able to establish itself permanently in either position”).

⁴⁴ Patrice Maniglier, *Acting Out the Structure*, in *CONCEPT AND FORM VOLUME TWO: INTERVIEWS AND ESSAYS FROM THE CAHIERS POUR L’ANALYSE* 25, 41 (Peter Hallward and Knox Peden eds., 2012) (quoting Claude Levi-Strauss, *The Structural Study of Myth*, in *CLAUDE LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY* 228 (1963)). *See* KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 6 (footnote 1), 8 (footnote 4), and 11 (footnote 9), referring to two of Levi-Strauss’ major works without subjecting them to sustained analysis. *See also* Caudill, *supra* note 14, at 670 (on structuralism,

the impossibility of finding validation in either “the sociological [or] the political” (first trauma),⁴⁵ together with the unavailability of a tenable position between the domains (second trauma), that “generate[s] the . . . myth” of a “specifically ‘legal’ discourse.” Koskenniemi diagnoses international law’s neurosis as “consist[ing]” in that myth, “in” the oscillation between “concreteness” and “normativity.”

Lacan explores the relationship between trauma, myth, and neurosis, mapped by Levi-Strauss, by re-evaluating Freud’s case of “The Rat Man.”⁴⁶ The parallels between Lacan’s analysis of the Rat Man and Koskenniemi’s analysis of international law are, as we will see, significant.

II. Lacan and the Rat Man

The Rat Man’s father, a soldier, “gambled away the regimental funds,” relied on “a friend” to bail him out,⁴⁷ and failed to reimburse the friend, who disappeared.⁴⁸ The family remembers and speaks of this “episode in the father’s past” and “a kind of belittlement by his contemporaries permanently follows” him.⁴⁹

As a young man, the father had a “strong attachment . . . to a poor but pretty girl” but he married the woman who would become the Rat Man’s mother because she “occupie[d] a much higher station in the bourgeoisie and [brought him] . . . both the means of livelihood and even the job he [held] at the time they [were] expecting their child.”⁵⁰

When “[the Rat Man’s] father urged him to marry a rich woman [possibly his cousin] the neurosis proper had its onset.”⁵¹ He ordered new glasses for delivery by post from his optician in Vienna, having lost his original glasses at around the time he flirted with “a servant girl . . . during maneuvers.”⁵² After losing the glasses an army captain told the Rat Man about a form of punishment in which “a rat stimulated by artificial means is inserted into the rectum of the victim.”⁵³ Once the glasses arrived the captain told the Rat Man “that he must reimburse Lieutenant A who is in charge of the mail and who is supposed to have paid” for the delivery of the glasses.⁵⁴ The charges were, in fact, paid by “[a] generous lady at the post office” rather than Lieutenant A and, in any event, Lieutenant B was responsible for the mail.⁵⁵

To fulfil his self-imposed obligation to the captain the Rat Man devised a plan: “Lieutenant A will reimburse the generous lady at the post office, and, in his presence, she must pay over the sum in question to Lieutenant B

Levi-Strauss and Lacan). Singh, *The Critic(al Subject)*, *supra* note 14, at 3, 10 and 14, suggests, with reference to Roland Barthes, that “myth” plays an important role in Koskenniemi’s work without, however, defining the specific “myth,” or the function of “myth” as a concept, in Koskenniemi’s work.

⁴⁵ KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1.

⁴⁶ See Maniglier, *supra* note 44, at 41. See also Frederick J Wertz, *Freud’s Case of the Rat Man Revisited: An Existential-Phenomenological and Socio-Historical Analysis*, 34(1) JOURNAL OF PHENOMENOLOGICAL PSYCHOLOGY 47 (2003) (on the case of the Rat Man).

⁴⁷ Jacques Lacan, *The Neurotic’s Individual Myth*, 48 PSYCHOANALYTICAL QUARTERLY 405, 411 (1979).

⁴⁸ *Id.* at 414.

⁴⁹ *Id.* at 411.

⁵⁰ *Id.* See also Maniglier, *supra* note 44, at 42.

⁵¹ Lacan, *Myth*, *supra* note 47, at 411. See also Maniglier, *supra* note 44, at 42.

⁵² Lacan, *Myth*, *supra* note 47, at 412, 415.

⁵³ *Id.* at 409.

⁵⁴ *Id.* at 412.

⁵⁵ *Id.* at 413. See also Maniglier, *supra* note 44, at 43.

and then he himself will reimburse Lieutenant A.”⁵⁶ Linked to this neurotic plan, the Rat Man suffered delusional fantasies about the infliction of the rat punishment on his (dead) father or the “servant girl.”⁵⁷

“[T]he neurotic’s individual myth” involved a “phantasmic scenario” of debt, love and punishment in which the Rat Man “re-enact[ed] a ceremony which reproduce[d] almost exactly [the] inaugural relationship” of “the father, the mother, and the friend.”⁵⁸ The captain stands in a position similar to that of the father. The Rat Man feels a duty to obey him (the captain) “even though (or, rather, because he knows that) he has no grounds for obeying him.”⁵⁹ The fact that the Rat Man feels compelled to obey the captain / father despite the fact that he feels he / they have no right expect obedience causes him to fantasise about inflicting the rat punishment on his father.⁶⁰

By gambling away the regiment’s money and failing to repay his friend’s loan the father castrated himself.⁶¹ That established a chain of events that led him to marry the rich girl (the Rat Man’s mother) rather than the “poor but pretty girl” he seems to have loved. The father’s (supposedly) poor choices locked the Rat Man into a “perennially unsatisfying turning maneuver” which “never succeeds in closing the loop.”⁶² Repaying the debt to the “lady at the post office” / Lieutenant B / Lieutenant A would, in the Rat Man’s neurotic mind, “[close] the loop” by re-writing his / his father’s history,⁶³ un-castrating both men, restoring their “viril[ity]” and allowing them to live according to their own free will rather than in circumstances dictated by fate and error.⁶⁴

For Lacan “the wellspring of analytic experience” is the shedding of “more light” on the neurotic’s condition,⁶⁵ not by curing the neurosis but by enabling the neurotic to understand the causes of his condition so that he can accept and exist within *his* structure.⁶⁶ The analyst facilitates this process of adjustment by:

assum[ing] almost surreptitiously, in the symbolic relationship with the subject, the position of . . . the master – the moral master, the master who initiates the one still in ignorance into the dimension of fundamental human relationships and who opens for him what one might call the way to moral consciousness, even to wisdom, in assuming the human condition.⁶⁷

Lacan’s analysis of the Rat Man’s neurosis maps onto Koskenniemi’s analysis of international law’s relationship with sociology / apology vs. politics / utopia, leading to two key conclusions. First, that Koskenniemi treats international law as a neurotic patient and, second, that in doing so he becomes international law’s analyst / “master.”⁶⁸

⁵⁶ Lacan, *Myth*, *supra* note 47, at 413.

⁵⁷ *Id.* at 412.

⁵⁸ *Id.* at 414.

⁵⁹ Maniglier, *supra* note 44, at 43.

⁶⁰ *Id.*

⁶¹ See Lacan, *Myth*, *supra* note 47, at 415 (“the frustration, indeed a kind of castration of the father”).

⁶² *Id.*

⁶³ See Jacques Lacan, *The Subversion of the Subject and the Dialectic of Desire*, in JACQUES LACAN, *ÉCRITS* 671, 698 (Bruce Fink trans., 2006) (“The Father the neurotic wishes for is clearly the dead Father – that is plain to see. But he is also a Father who would be the perfect master of his desire – which would be just as good, as far as the subject is concerned”).

⁶⁴ See Lacan, *Myth*, *supra* note 47, at 416-17.

⁶⁵ *Id.* at 425.

⁶⁶ *Id.* at 407.

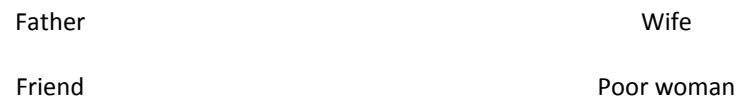
⁶⁷ *Id.* at 407-08.

⁶⁸ See David Kennedy, *The Last Treatise*, *supra* note 5, 991 (“I continue to be struck . . . by the relative scarcity of work picking up, reworking, extending, or contesting the broad argument of *From Apology to Utopia* . . . Martti’s book is rarely challenged or deeply engaged . . . I often have the feeling that the book’s symbolic meaning has somehow overtaken its analysis”); Jan Klabbers, *Towards a Culture of Formalism? Martti Koskenniemi and the Virtues*, 27 *TEMPLE INT’L & COMP. L.J.* 417, 418 (2016) (commenting on Kennedy’s review

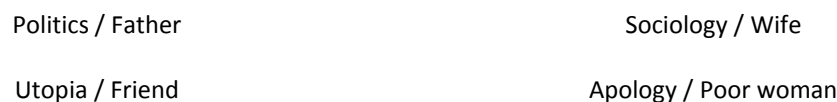
Koskenniemi's four-part, two-group structure of sociology / apology and politics / utopia can be represented thus:



This mirrors – indeed, the above diagram is based on the structure of – this representation, by Patrice Maniglier, of the Rat Man's "[f]amilial [c]omplex":⁶⁹



Merging the two diagrams above makes the parallels between the Rat Man's neurosis and international law's neurotic condition clear:



"Normativity" and "concreteness" might be added to the picture as synonyms for utopia and apology but that does nothing to disturb the four-part, two-group structure.

Politics is the unsatisfied, dead father who would have his son (international law) be a "real man," bending the world to his will. The unachievability of this ambition is reflected in the connection Koskenniemi establishes between politics and utopia; utopia is, by definition, a non-place, a dead father. The parallel between utopia for international law and the friend in the story of the Rat Man is established by the fact that the friend has vanished; the son / Rat Man cannot repay the debt to him even if he wants to because he cannot find him, in the same way that international law is unable to find utopia.

Sociology is international law's wife / mother. The story of the Rat Man is permeated by a sense that the father married the wrong woman. The tacit argument in the family's history is that if he were a "real man" he would have married the "poor but pretty girl," found money and status for himself rather than through marriage, and secured utopia rather than settling for an apology of a marriage. International law's relationship with sociology – with the concrete reality of the world – is similarly apologetic. To accept the world as it is, rather than as you would have it be, is to deny utopia and castrate yourself in the interests of an easy life.

International law, like the Rat Man, cannot satisfy its father (politics), cannot find its missing friend / "true" lover (utopia), and, by satisfying its mother / wife (sociology), apologises for its lack of virility. Faced with no choice outside of this utopia / apology structure, international law / the Rat Man "makes a perennially unsatisfying turning maneuver and never succeeds in closing the loop":⁷⁰

of *From Apology: "From Apology to Utopia*, or Koskenniemi's work in general, is treated as the gospel, the final word marking, as Fukuyama might be tempted to put it, "the end of history." (footnote omitted)); Singh, *The Critic(al Subject)*, *supra* note 14, at 11 ("The image we see in *From Apology to Utopia* is that of a critic who aspires to less domination as his ideal, all the while constantly perpetuating a form of domination himself").

⁶⁹ Maniglier, *supra* note 44, at 42.

⁷⁰ Lacan, *Myth*, *supra* note 47, at 415.

The dynamics of international legal argument is provided by the contradiction between the ascending and descending patterns of argument and the inability to prefer either. Reconciliatory doctrines will reveal themselves as either incoherent or making a silent preference . . . doctrine is forced to maintain itself in *constant movement from emphasizing concreteness to emphasizing normativity and vice-versa* without being able to establish itself permanently in either position.⁷¹

Lacan's analysis of the Rat Man revises Freud's theory of the structural causes of neurosis.⁷² As David Macey explains, Freud understood neurosis as a result of children being unable to make the "difficult transition from an immediate relationship with the mother" into "a triangular situation" that also included "the father."⁷³ Lacan prefers a four-part structure, with an "emphasis . . . on more abstract and universal structures of kinship and alliance,"⁷⁴ to Freud's two-part structure of mother / father and his emphasis on the "family."⁷⁵

Lacan's preference is explained by his debt to Levi-Strauss.⁷⁶ As Macey explains, Levi-Strauss applied Ferdinand de Saussure's and, in particular, Roman Jakobson's work on the structure of language, to the study of culture.⁷⁷ For Jakobson "a phoneme is a basic unit of signification . . . a [purely] differential unit,"⁷⁸ a form without content or fixed meaning. Levi-Strauss adopts this concept of the "phoneme" in his analysis of the prohibition on incest as "an empty but indispensable form, making both possible and necessary the articulation of biological groups in a network of exchange that allows them to communicate with one another."⁷⁹ Maniglier charts Levi-Strauss's application of this structural-linguistic understanding of human behaviour to the study of myth and neurosis, noting the connection with Lacan's Rat Man analysis.⁸⁰

Macey's and Maniglier's analysis of the links between Saussure and Jakobson (linguistics), Levi-Strauss (anthropology), and Lacan (psychoanalysis) situates neurosis as a product of the neurotic's troubled relationship with his mythical structure. The patient's behaviour – in the context of sovereignty doctrine, or questions about the nature of customary international law, for example – can be understood through "kinship" ties to father, mother, wife, friend and lover / politics, sociology, utopia and apology.

In *From Apology* Koskeniemi diagnoses international law's neurosis, "initiat[ing] the one still in ignorance" – international law itself – "into the dimension of fundamental . . . relationships . . . open[ing] . . . what one might call the way to moral consciousness, even to wisdom, in assuming the [international legal] . . . condition."⁸¹ *From Apology* allows international law(yers) to "[assume] the [international legal] condition" by encouraging it / them to live with(in) international law's "mythic network."⁸² Koskeniemi's "project is to try to revive a sense of [international law's] original mission, its importance. I suspect I am creating a myth (for it

⁷¹ KOSKENIEMI, *FROM APOLOGY*, *supra* note 4, at 65.

⁷² Maniglier, *supra* note 44, 41-46.

⁷³ David Macey, *Introduction*, in JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS* vii, xxv (Jacques-Alain Miller ed., Alan Sheridan trans., 1994).

⁷⁴ *Id.* at xxiii.

⁷⁵ *See id.* at xxiii – xxv.

⁷⁶ *See* DOUZINAS, *supra* note 14, at 301 ("Jacques Lacan . . . turn[ed] Freud's story [about the origins of law in murder, crime, and violence] into a mythical structure and . . . read it, in a way similar to Levi-Strauss's explanation of the elementary structures of kinship").

⁷⁷ Macey, *supra* note 73, at xxiii.

⁷⁸ *Id.* at xxiii

⁷⁹ *Id.* at xxiv.

⁸⁰ Maniglier, *supra* note 44, 39-46. *See also* Lacan, *Subversion*, *supra* note 63, at 676-77 (on his work, Freud, Saussure and Jakobson).

⁸¹ Lacan, *Myth*, *supra* note 47, at 407-08.

⁸² *Id.* 415.

probably never was much better) – but myth-creation is an important aspect of political activity and activism.”⁸³

From Apology maps the “twisted relations” between “normativity” and “concreteness,” tracing the “echoes” of the double trauma of pursuing sociological *and* political validation across “all [of international law’s] doctrinal spheres.”⁸⁴ This mapping leads to the conclusion that “there is no real discourse going on in international legal argument but only a patterned exchange of argument,”⁸⁵ and that means that “recourse to equity, good faith and the like” is “less a cause for despair than for hope.”⁸⁶ “[T]he objectivist dream [of a determinative discourse] was faulted from the outset” and “lawyers [therefore] need to take seriously their unconscious shift into arguing from moral obligation.”⁸⁷ The international lawyer remains “constrained . . . inasmuch as he experiences the conflicting pull of the criticisms of [his “kinship” with wife / mother / sociology / concreteness/] apology and [his “kinship” with father / politics / friend / lover / normativity/] utopia, [but] he is not fully so.”⁸⁸ There is a limited freedom for the international lawyer, but only *within* the “kinship” structure.⁸⁹

In “Between Commitment and Cynicism,”⁹⁰ his most overtly psychological text,⁹¹ Koskenniemi notes that whilst utopianism attracts practitioners to international law experience moves them towards cynicism.⁹² International lawyers cannot be entirely “genuine” in their commitment to international law, rejecting any and all cynicism, because “an unwavering belief in its intrinsic goodness” is untenable.⁹³ We are left with the consolation prize of the “light” that psychoanalysis shines onto the condition of international lawyers,⁹⁴ illuminating our neurotic place in international law’s (mythical) structure.

III. International Law “as a language”

Language both in its structure and action is homologous with the law . . . ‘the law of man has been the law of language since the first words of recognition.’⁹⁵

[T]he unconscious is structured as a language⁹⁶

⁸³ Emmanuel Jouannet, *Koskenniemi: A Critical Introduction*, in MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* 1, 1 (2011) (quoting Koskenniemi’s comment, in 2004, at the Sorbonne).

⁸⁴ Maniglier, *supra* note 44, at 41 (“it is not an isolated event which can be traumatizing but rather the kind of twisted relations that it bears with another event, which it echoes . . . by transforming it in a way which then makes it impossible for it not to be endlessly repeated”); KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 515 (“all doctrinal spheres”).

⁸⁵ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 511.

⁸⁶ *Id.* at 511, 515.

⁸⁷ *Id.* at 515.

⁸⁸ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 549.

⁸⁹ See Beckett, *supra* note 9, at 1087 (“law is not our tool; we are constructs of international legality”).

⁹⁰ Martti Koskenniemi, *Between Commitment and Cynicism: Outline of a Theory of International Law as Practice*, in *COLLECTION OF ESSAYS BY LEGAL ADVISERS OF STATES, LEGAL ADVISERS OF INTERNATIONAL ORGANIZATIONS AND PRACTITIONERS IN THE FIELD OF INTERNATIONAL LAW* 495 (1999).

⁹¹ *Id.* at 497 (“I shall aim at providing a somewhat impressionistic sketch of the structure of the psychological positions available to international law practitioners”).

⁹² *Id.* at 498, 502-06.

⁹³ *Id.* at 497.

⁹⁴ Lacan, *Myth*, *supra* note 47, at 425 (“more light”).

⁹⁵ DOUZINAS, *supra* note 14, 305 (quoting Jacques Lacan, *The Function and Field of Speech and Language in Psychoanalysis*, in Jacques Lacan, *ÉCRITS* 197, 225 (Bruce Fink trans., 2006) (Douzinas uses a different version of Lacan’s text)).

⁹⁶ Jacques Lacan, *Of Structure as the Inmixing of an Otherness Prerequisite to Any Subject Whatever*, LACAN.COM, <http://www.lacan.com/hotel.htm> (last visited June 7 2016).

‘structured’ and ‘as a language’ for me mean exactly the same thing.⁹⁷

Understanding international law, in Koskenniemi’s terms, “as a language” does not offer normative clarity in particular cases,⁹⁸ nor is it possible to explain the content of the language through particular events or concrete facts. À la Saussure’s theory of language, international legal “[m]eaning is not . . . present in the expression itself” but “relational.”⁹⁹ International legal words or terms “are somehow self-defining,”¹⁰⁰ “like holes in a net . . . [e]ach empty in itself . . . identi[fied] only through the strings which separate it from the neighbouring holes.”¹⁰¹ “Knowing a language – understanding the meaning of words – is to be capable of operating these differentiations,”¹⁰² and it is “the feeling of the native speaker which remains . . . the test of the presence or absence of distinctive features.”¹⁰³

Koskenniemi’s Saussurean approach distinguishes between “the system of differences within which the meaning of speech-acts is constituted,” or “*langue*,” and “individual, historical speech-acts,” or “*paroles*,” focussing on the former (“*langue*”) as the structurally determinative force in language and discourse.¹⁰⁴ A prioritisation of present system (“the synchronic”) over past acts (“the diachronic”) defines Saussurean linguistics, according to Fredric Jameson.¹⁰⁵ “[T]he synchronic” is concerned with “the immediate lived experience of the *native speaker*” or,¹⁰⁶ as Macey puts it, “the dimension in which language exists as a system.”¹⁰⁷ *From Apology* is a synchronic, internal, linguistic account of international law’s ontology and practice; an account of international law “as a language,” “a system of production of good legal arguments,” written by and from the perspective of a “native language-speaker.”¹⁰⁸ “Diachrony,” the antithesis of synchrony, “is the historical dimension in which languages evolve.”¹⁰⁹ It “rests on a kind of intellectual construction, the result of comparisons between one moment of lived time and another by someone who stands outside . . . substitut[ing] a purely intellectual continuity for a lived one.”¹¹⁰

Lacan, like Saussure, prefers the synchronic to the diachronic:

A psychoanalyst should find it easy to grasp the fundamental distinction between signifier and signified . . . *The first network, that of the signifier, is the synchronic structure of the material of language* insofar as each element takes on its precise usage therein by being different from the others; this is the principle of distribution that alone regulates the function of the elements of language [*langue*] at its different levels, from the phonemic pair of oppositions to compound

⁹⁷ *Id.*

⁹⁸ KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 568.

⁹⁹ *Id.* at 8-9. See also *id.*, at 8 (footnote 4) (inviting the reader to “[s]ee generally Saussure (Course)”). See FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 9 (Charles Bally and Albert Sechehaye eds., Wade Baskin trans., 1966) (“But what is language [*langue*]? It is not to be confused with human speech [*langage*], of which it is only a definite part . . . It is both a social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty”).

¹⁰⁰ JAMESON, PRISON-HOUSE, *supra* note 1, at 17.

¹⁰¹ KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 9.

¹⁰² *Id.* at 9.

¹⁰³ JAMESON, PRISON-HOUSE, *supra* note 1, at 17.

¹⁰⁴ KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 7.

¹⁰⁵ JAMESON, PRISON-HOUSE, *supra* note 1, at 3-39.

¹⁰⁶ *Id.* at 6 (emphasis added).

¹⁰⁷ Macey, *supra* note 73, at xxiii.

¹⁰⁸ KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 568.

¹⁰⁹ Macey, *supra* note 73, at xxiii.

¹¹⁰ JAMESON, PRISON-HOUSE, *supra* note 1, at 6.

expressions, the task of the most modern research being to isolate the stable forms of the latter. The second network, that of the signified, is the diachronic set of concretely pronounced discourses, which historically affects the first network, just as the structure of the first governs the pathways of the second. What dominates here is the unity of signification, which turns out to never come down to a pure indication of reality [*réel*], but always refers to another signification. In other words, signification comes about only on the basis of taking things as a whole [d'ensemble] . . . The signifier alone guarantees the theoretical coherence of the whole as a whole.¹¹¹

The signifier, which Lacan associates with the synchronic, is that which signifies – language. The signified is that which is signified by language – “reality.” Lacan represents the relationship between signifier and signified thus:¹¹²

$$\frac{S}{s}$$

The point, here, is that “linguistics” as a “science is . . . based, in effect, on the primordial position of the signifier and the signified as distinct orders initially separated by a barrier resisting signification.”¹¹³ Because “no signification can be sustained except by reference to another signification,”¹¹⁴ because “there is no existing language [*langue*] whose ability to cover the field of the signified can be called into question,”¹¹⁵ and because the notion that “the signifier serves . . . the function of representing the signified, or better, that the signifier has to justify . . . its existence in terms of any signification whatsoever” is an “illusion,”¹¹⁶ the signifier has priority over the signified or, more accurately, “the signifier in fact enters the signified . . . in a form which, since it is not immaterial, raises the question of its place in reality.”¹¹⁷ As Yannis Stavrakakis explains, for Lacan “meaning is produced by signifiers; it springs from the signifier to the signified and not vice versa (as argued by realist representationalism).”¹¹⁸

Lacan draws extensively on Saussure’s work but “deviate[s] from the Saussurian model.”¹¹⁹ “The primacy of the signifier is not an idea found in Saussure’s work”;¹²⁰ indeed, as Michel Borch-Jacobsen explains, “Saussure’s *langue*” – which Koskeniemi defines in terms of a “controlling legal *langue*, the *conditions of what can acceptably be said within* [international law], or what it is possible to think or believe in it”¹²¹ – “does not gain entry into Lacan’s doctrine before having been emptied of all representative functions.”¹²²

¹¹¹ Jacques Lacan, *The Freudian Thing or the Meaning of the Return to Freud in Psychoanalysis*, in JACQUES LACAN, *ÉCRITS* 334, 345 (Bruce Fink trans., 2006) (paragraph breaks suppressed).

¹¹² Jacques Lacan, *The Instance of the Letter in the Unconscious*, in JACQUES LACAN, *ÉCRITS* 412, 414 (Bruce Fink trans., 2006).

¹¹³ *Id.* at 415.

¹¹⁴ *Id.* (footnote omitted).

¹¹⁵ *Id.* (square brackets in original).

¹¹⁶ *Id.* at 416.

¹¹⁷ *Id.* at 417.

¹¹⁸ YANNIS STAVRAKAKIS, *LACAN AND THE POLITICAL: THINKING THE POLITICAL* 25 (1999).

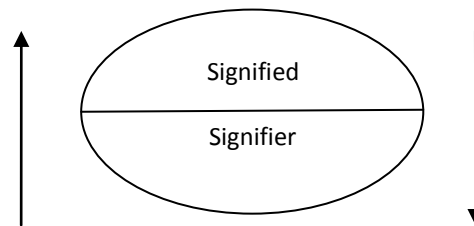
¹¹⁹ Owen Hewitson, *What does Lacan say about the signifier?*, LACAN.COM, 20 June 2010, <http://www.lacanonline.com/index/2010/06/what-does-lacan-say-about-the-signifier/> (last visited June 7 2016).

¹²⁰ *Id.*

¹²¹ KOSKENIEMI, *FROM APOLOGY*, *supra* note 4, at 11.

¹²² MIKKEL BORCH-JACOBSEN, *LACAN: THE ABSOLUTE MASTER* 173 (Douglas Brick trans., 1991).

Saussure's concept of the relationship between signifier and signified, in contrast to the diagram ('S' and 's') above depicting Lacan's concept, can be represented thus:¹²³



As Dany Nobus explains:

The most conspicuous difference between Saussure's and Lacan's diagrams concerns the positions of the signifier and the signified relative to the bar that separates them. Whereas in Saussure's schema, the signified and the signifier are located above and beneath the bar respectively, in Lacan's version their position has been interchanged. Secondly, whereas Saussure's diagram suggests if not an equivalence, at least a parallelism between the signified and the signifier, owing to the similarity with which they are graphically inscribed above and beneath the bar, Lacan's algorithm underscores visually the incompatibility of the term terms. For in Lacan's formula the signifier is written with an upper-case letter (S) and the signified appears in lower-case type (s), and is italicized (s).¹²⁴

The signified does not feature in *From Apology*.¹²⁵ It is a Lacanian inquiry into the internal "dynamics" of international legal argument,¹²⁶ and it understands international law as a pure signifier with (Lacanian) "primacy" over the signified.¹²⁷

IV. "[F]rom structure to subject"

Despite its emphasis on the perspective of the "native speaker," international law's synchronic language is "prior" to the subject.¹²⁸ The lawyer / subject is an "effect" of the structure.¹²⁹ "the very relation [he] has to [him]self must be rooted in the impossibility of coinciding with [him]self."¹³⁰

¹²³ Diagram reproduced from Dany Nobus, *Lacan's science of the subject: between linguistics and topology*, in THE CAMBRIDGE COMPANION TO LACAN 50, 52 (Jean-Michel Rabaté ed., 2003).

¹²⁴ *Id.* at 53. See also Ernesto Laclau, *Identity and Hegemony: The Role of Universality in the Constitution of Political Logics*, in JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ŽIŽEK, *CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT* 44, 69 (2000); STAVRAKAKIS, *supra* note 118, at 24-25.

¹²⁵ See Rasulov, *supra* note 13, at 656-63 (commenting, without reference to Lacan or the connection between Lacan and Saussure, on Saussurean linguistics and *From Apology's* focus on the signifier).

¹²⁶ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 58.

¹²⁷ *Id.* at 13 ("By providing an 'insider's view' to international legal discourse"). See David Kennedy, *Apology to Utopia*, *supra* note 17, at 386 ("[r]ather than applying criticisms developed by other fields or writing from a viewpoint outside international law, [Koskeniemi] produces a criticism that is internal and, ultimately, situated in the best traditions of the discipline"). See also Carty, *supra* note 14, at 864 ("[b]eyond Wittgenstein-style language games there is no reality, no referent"); Rasulov, *supra* note 13, at 642 ("[From Apology's] most important theoretical legacy [is] a highly novel and very powerful argument in defence of the *anti-anti-disciplinarian theoretical agenda* in the field of academic international legal studies").

¹²⁸ Jacques-Alain Miller, *Action of the Structure*, in CONCEPT AND FORM VOLUME ONE: KEY TEXTS FROM THE CAHIERS POUR L'ANALYSE 69, 74 (Jean-Michel Rabaté ed., 2012).

¹²⁹ Maniglier, *supra* note 44, at 27. See also Yves Durox, *Strong Structuralism, Weak Subject*, in CONCEPT AND FORM VOLUME TWO: INTERVIEWS AND ESSAYS FROM THE CAHIERS POUR L'ANALYSE 187, 199-200 (Peter Hallward and Knox Peden eds., 2012).

¹³⁰ Maniglier, *supra* note 44, at 27. See also DOUZINAS, *supra* note 14, at 304 ("I must identify with my image in the mirror and with my name . . . I must accept division and negativity, I must accept that I am what I am not, in [Arthur] Rimbaud's felicitous phrase that 'Je est un autre'").

The statement “I am an international lawyer” is circular and meaningless without international law’s structure.¹³¹ The international lawyer is “a paradoxical entity” that “can only constitute itself as being different from itself: its very identity is to escape itself.”¹³² The subject / international lawyer “escape[s] itself” by *subjecting* itself to international law’s linguistic structure. This is the Lacanian meaning of the statement “I am an international lawyer;”¹³³ “[t]he subject speaks and comes into existence by being spoken in language, in other words by being alienated one more time from bodily and sensory experience into the cold world of the sign.”¹³⁴

From Apology moves “from structure to subject” because the structure has “prior[ity].”¹³⁵ It does this by identifying the longed-for “specifically ‘legal’ discourse” as a myth, by mapping neurotic efforts to validate the myth in a search for “concreteness” and “normativity”, and by exploring viable modes of practice within the linguistic structure that myth and neurosis create:

lawyers expectations of certainty should be downgraded . . . they – as well as States and statesmen – must take seriously the moral-political choices they are faced with when arguing ‘within the law’ and accept the consequence that in some relevant sense the choices are theirs and that they therefore should be responsible for them.¹³⁶

V. Structure / Subject / Suture

If, as Jacques-Alain Miller, Lacan’s collaborator and editor, maintains, “[s]tructure [is] that which puts in place an experience for the subject that it includes” then structures are existentially dependent on the “inclu[sion]” of a subject.¹³⁷ Without a declaration of subjectivity the subject features in the structure only as a “lack,” as something that is “lacking . . . [but] not purely and simply absent.”¹³⁸ “Suture” expresses “lack” in this sense, by “nam[ing] the relation of the subject to the chain of its discourse.”¹³⁹ By declaring its subjectivity the subject “stand[s]-in” or “tak[es]-the-place-of” the subject that the structure originally lacked,¹⁴⁰ occupying the space that the structure held open for it.¹⁴¹

¹³¹ Maniglier, *supra* note 44, at 27 (“the rationale for such a paradoxical definition of subjectivity has to do with the problem of the relation between *being* and *subjectivity*. Does it make sense to say that “I” am . . . is it possible to apply the category of truth to the subject of knowledge itself?”). See also Ernesto Laclau, ‘Power and Representation’, in ERNESTO LACLAU, EMANCIPATION(S) 84, 92 (2007) (“The hegemonic subject cannot have a terrain of constitution different from the structure to which it belongs”).

¹³² Maniglier, *supra* note 44, at 28.

¹³³ See Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 140 (1984) (“Structuralism argued that the systematic form of language, rather than the particular linguistic elements of actual spoken words, gave rise to intelligibility . . . the role of the speaker as agent was displaced. The speaker was now dependent on language itself to engage in meaningful activities . . . The subject was better understood as a product of culture, an identity created in language, a potentiality limited by the language that defined the conventions of a world”). See also KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 7 (footnote 1), describing Heller’s article as “useful.”

¹³⁴ DOUZINAS, *supra* note 14, at 303.

¹³⁵ Miller, *supra* note 128, at 74.

¹³⁶ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 536.

¹³⁷ Miller, *supra* note 128, at 71.

¹³⁸ *Id.* at 93.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See Laclau, *Power*, *supra* note 131, at 92 (“the structure is not fully reconciled with itself . . . it is inhabited by an original lack, by a radical undecidability that needs to be constantly superseded by acts of decision. These acts are precisely what constitute the subject, who can only exist as a will transcending the structure”). See also Slavoj Žižek, *Class Struggle or Postmodernism? Yes Please*, in JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ŽIŽEK, *CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT* 90, 119 (2000) (“for Lacan, the subject prior to subjectivization is not some Idealist pseudo-Cartesian self-presence preceding material interpellatory practice and apparatuses, but the very gap in the structure that the imaginary (mis)recognition in the interpellatory Call endeavours to fill in”). Singh, *The Critic(al Subject)*, *supra* note 14, at 9 and 12, wrestles with the relationship between subject and structure in Koskenniemi’s work

Ernesto Laclau evokes this notion of a sutured subject, asserting “the subject who takes the decision is only partially a subject; he is also a background of sedimented practices organizing a normative framework which operates as a limitation on the horizon of options.”¹⁴² *From Apology’s* international lawyer is sutured into the structure, “stand[ing]-in” the structure’s prefabricated subject-space.

The possibilities of “critical lawyer[ing],”¹⁴³ of a “critical politics which does not need to rely on utopian justice nor become an apology of actual power,”¹⁴⁴ are defined by the structure.¹⁴⁵ International legal practice “is not the application of ready-made, general rules or principles but a conversation about what to do, here and now.”¹⁴⁶ “Uncertainty and choice are an ineradicable part of [international legal] practice” because the notion that international law provides unambiguous, ready-made solutions to conflicts involves an “objectification mistake,”¹⁴⁷ treating law as a (definite, defined) object when it is, in fact, an (ambiguous, interpretable) social construct.¹⁴⁸

International lawyers are not only entitled but obliged to make political choices which resolve legal disputes in line with their “authentic commitment” to international law,¹⁴⁹ their “integrity as . . . lawyer[s].”¹⁵⁰ Being an “authentic,” committed international lawyer “is [to exist in] the distance between the undecidability of the structure and the decision,”¹⁵¹ to live with(in) international law’s neurosis, with(in) the search for “concreteness” and “normativity,” by “get[ting] over” the idea that we ought to have found a “specifically ‘legal’ discourse” by now.¹⁵²

without reference to “suture” or discussion of its place in the broader Lacanian / Laclauian framework and is, consequently, unable to grasp the dialectical, mutually constitutive relationship between subject and structure in Koskenniemi’s work. This leads to the (in my view) mistaken conclusion – on which, *see also infra* note 152 – that “the absolute free and empty subject is presupposed by Koskenniemi’s critique.” *Id.* at 13.

¹⁴² Laclau, *Identity and Hegemony*, *supra* note 124, at 82.

¹⁴³ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 548.

¹⁴⁴ *Id.* at 539.

¹⁴⁵ *See* Caudill, *supra* note 14, at 660 (footnote 46) (“In Lacan’s [concept of the] unconscious, society precedes individuality”).

¹⁴⁶ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 544.

¹⁴⁷ *Id.* at 555, 537.

¹⁴⁸ *Id.* at 537-48.

¹⁴⁹ *Id.* at 546-47. *See also* Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 512 (“It is, I believe, precisely [the] sense of doubt, uncertainty, and occasional schizophrenia . . . that is in the background when international lawyers describe their practice in terms of a *commitment*, instead of, say, a knowledge or a faith”); *id.* at 508 (“The law brings the committed lawyer to the brink of the (legal) decision, but never quite into it. If a civil strife arises, the law tells the lawyer: ‘Here are two rules, “self-determination” and “uti possidetis.” Now choose”’).

¹⁵⁰ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 555. *See also id.* at 498-99 (“To be a voice for no particular interests or position is not a lucrative affair; it calls for commitment! . . . This aspect of commitment has to do with the avoidance of politics, prejudice and everything else that appears as external, as strictly outside the law and is often described in terms of the good lawyer’s particular ‘integrity’”).

¹⁵¹ Laclau, *Identity and Hegemony*, *supra* note 124, at 79.

¹⁵² Aristodemou, *supra* note 14, at 37 (“get over”); KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 1 (“specifically ‘legal’ discourse”). *See* Laclau, *Power*, *supra* note 131, at 89 (“a contingent intervention taking place in an undecidable terrain is . . . a hegemonic intervention”). *See also* KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 553 (on the international lawyer’s “role”); Prost, *Born Again Lawyer*, *supra* note 11, at 1039 (“part of what [*From Apology*] does is illustrate how there is no such thing as an ‘objective’ system of international law, i.e. an autonomous law which judges can ‘find’ and use as a non political device for settling disputes, and which students can learn ‘as it is’”); Singh, *Koskenniemi’s Images*, *supra* note 29. I disagree with Singh when he concludes that “the Sartrean subject [is] at the heart of *From Apology to Utopia*,” claims that “the absolute free and empty subject is presupposed by Koskenniemi’s critique,” and argues that “[s]he [the international lawyer] is able to briefly separate herself from the grounds of her own construction.” Singh, *id.*, at 710, 714, 724. KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, is, in my view, and as explained above, based on a Lacanian understanding of the sutured relationship between subject and structure.

Koskenniemi's psychoanalysis of international law is, ultimately, a psychoanalysis of international lawyers also. International law and international lawyers are inseparable because the international legal subject is sutured into the linguistic structure.¹⁵³

C. THERAPY

I. Hegemony

From Apology is an argument for the hegemony of the international lawyer as a therapeutic response to international law's neurosis.¹⁵⁴ It advocates political decision-making by international lawyers within international law's linguistic structure as the form of legal practice most appropriate in a fragmented, global socio-political context.¹⁵⁵

In *Hegemony and Socialist Strategy* Ernesto Laclau and Chantal Mouffe define hegemony as "appear[ing]" in the "context" of a "fault (in the geological sense) . . . a fissure that had to be filled up . . . a contingency that had to be overcome."¹⁵⁶ Hegemony is something that "fills a space left vacant by a crisis of what . . . should have been a normal historical development,"¹⁵⁷ and it "supposes a theoretical field dominated by the category of articulation."¹⁵⁸

Laclau and Mouffe define "articulation" as "any practice establishing a relation among elements such that their identity is modified as a result of the articulatory practice,"¹⁵⁹ explaining that "[t]he structured totality resulting from the articulatory practice" is a "discourse."¹⁶⁰ "[E]lements" are "floating signifiers, incapable of being wholly articulated to a discursive chain,"¹⁶¹ and "articulation" involves "the transition from 'elements' to 'moments,'"¹⁶² for all that this "transition" is "never entirely fulfilled."¹⁶³ "[M]oments" are defined as the "differential positions . . . articulated within a discourse,"¹⁶⁴ arguments formed out of a particular arrangement of "elements," and "articulation" ultimately "consists in the construction of nodal points which partially fix meaning,"¹⁶⁵ of "points de capiton . . . privileged signifiers that fix the meaning of a signifying chain."¹⁶⁶

¹⁵³ KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 7 ("It may be too much to say that international law is *only* what international lawyers do or think. But at least it is that"); Justin Desautels-Stein, *From Apology to Utopia's Point of Attack*, 29 LEIDEN J. INT'L L. 677, 687 (2016) ("*From Apology to Utopia* suggested that it may very well be impossible to 'think' outside of [the] structure of legal thought, and if this was the case, then an understanding of the menu of such structures clued us in to the availability of different ways of conceptualizing the international legal order").

¹⁵⁴ See KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 13 (referring to "a therapeutic effect on lawyers").

¹⁵⁵ See ERNESTO LACLAU AND CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS x (2d ed. 2001) ("Our approach is grounded in privileging the moment of *political* articulation, and the central category of political analysis is, in our view, *hegemony*"). See also Martti Koskenniemi, "By Their Acts You Shall Know Them . . ." (*And Not by Their Legal Theories*), 15 EUR. J. INT'L L. 839, 851 (2004) ("*all law* (and not just semantically unclear law) is infected by indeterminacy. There is, in this sense, no middle-of-the-road solution at all: even one that initially seems such, is an occasionalist reliance on a momentarily hegemonic solution"); Desautels-Stein, *Point of Attack*, *supra* note 153, at 680-81 ("*From Apology to Utopia* sought to uncover practices of international legal argument in order to assist the international community in better understanding the structured relationship between international law and international politics" (footnote omitted)).

¹⁵⁶ LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 8.

¹⁵⁷ *Id.* at 48.

¹⁵⁸ *Id.* at 93.

¹⁵⁹ *Id.* at 105. See also Caudill, *supra* note 14, at 673 ("articulation is always an approximation of truth").

¹⁶⁰ LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 105.

¹⁶¹ *Id.* at 113.

¹⁶² *Id.* at 110.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 105.

¹⁶⁵ *Id.* at 112.

“Articulatory practice” is “possible” only because of the “incomplete,” “contingen[t]” nature of . . . discourse,¹⁶⁷ “the impossibility of fixing ultimate meanings,”¹⁶⁸ the fact that “no discursive formulation is a sutured totality,”¹⁶⁹ and because “moments [are] never entirely fulfilled.”¹⁷⁰ Subjects take up “‘subject positions’ within a discursive structure” by “suture[ing]” themselves into it,¹⁷¹ and practice hegemony as “a political type of relation, a form . . . of politics,”¹⁷² a “game” played through “articulatory practice” in conditions of “contingency and ambiguity . . . social division and antagonism.”¹⁷³ “[H]egemonic articulation” takes place in a climate of “antagonism” and “equivalence,”¹⁷⁴ on the basis that “society” is neither “totally possible,” because of irresolvable antagonisms between “subject positions,” nor “totally impossible” because of commonalities or equivalences between “subject positions.”¹⁷⁵

International law “should [, in the course of its] normal historical development,”¹⁷⁶ have become a “specifically ‘legal’ discourse [situated] between the sociological [its mother] and the political [its father].”¹⁷⁷ It did not, and that failure left it in a contingent, neurotic state. *From Apology* argues for hegemonic “articulatory practice” as the appropriate methodological response to the fact that the son (international law) is a young adult who did not enjoy a “normal historical development,” a healthy adolescence. He is, therefore, unable to satisfy both his mother (sociology) and his father (politics), largely because he has still not moved out of the family home and found a place of his own:

Normative imagination – reasoned folly – must take over where legal interpretation left off . . . As international lawyers, we have failed to use the imaginative possibilities open to us . . . we were cast as players in game, members in somebody’s team. It is not that we need to play the game better, or more self-consciously. We need to re-imagine the game, reconstruct its rules, redistribute the prizes.¹⁷⁸

From Apology’s sotto voce message seems to be that the “game” can be “re-imagine[d]” as hegemony, and Koskeniemi makes this almost explicit in a 2004 article arguing for an understanding of international law “as a hegemonic technique.”¹⁷⁹

¹⁶⁶ *Id.* at 113.

¹⁶⁷ *Id.* at 110-11.

¹⁶⁸ *Id.* at 111.

¹⁶⁹ *Id.* at 106.

¹⁷⁰ *Id.* at 110.

¹⁷¹ *Id.* at 115; *Id.* at 47, 88 (endnote 1) (“The concept of ‘suture’ ... is taken from psychoanalysis. Its explicit formulation is attributed to Jacques Alain-Miller ... although it implicitly operates in the whole of Lacanian theory. It is used to designate the production of the subject on the basis of the chain of its discourse.”). See the discussion of “suture” in *supra* section B. V., “Structure / subject / suture”.

¹⁷² *Id.* at 139.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 122-34.

¹⁷⁵ *Id.* at 129. See also Laclau, *Identity and Hegemony*, *supra* note 124, at 74 (“An always open intertextuality is the ultimately undecidable terrain in which hegemonic logics operate”).

¹⁷⁶ LACLAU AND MOUFFE, *HEGEMONY*, *supra* note 155, at 48.

¹⁷⁷ KOSKENIEMI, *FROM APOLOGY*, *supra* note 4, at 1. On sociology as “mother” and politics as “father” see *supra* section B. II., “Lacan and the Rat Man.”

¹⁷⁸ KOSKENIEMI, *FROM APOLOGY*, *supra* note 4, at 560-61 (paragraph break suppressed).

¹⁷⁹ Martti Koskeniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 197, 198 (2004).

My point, in tracing the origins of Koskenniemi's argument for international legal practice as hegemony back to the original publication of *From Apology* in 1989, is that hegemony has been the foundation of Koskenniemi's work from the beginning, and that it did not arrive as a mere add-on sometime around 2004. Beyond questions of timing, however, a more subtle and important point concerning Koskenniemi's treatment of the relationship between hegemony and international law also needs to be made.

Koskenniemi associates hegemony with "an argumentative practice in which particular subjects and values claim to represent that which is universal,"¹⁸⁰ placing particular emphasis on the "objective[s] of the contestants,"¹⁸¹ on the arguments advanced by states,¹⁸² and on the notion that "[p]rofessional competence in international law is precisely about being able to identify the moment's hegemonic and counter-hegemonic narratives and to list one's services in favour of one or the other."¹⁸³ Whilst he highlights international law's function as "a hegemonic politics,"¹⁸⁴ he does not present his argument as an argument for the hegemony of the international lawyer.

Hegemony, as a form of political practice, is compatible with, even produced by, deconstruction (recalling Koskenniemi's description of *From Apology*'s "approach" as "'deconstructive'").¹⁸⁵ For Laclau, "deconstruction discovers the role of the decision out of the undecidability of the structure" – in our context, out of the fact that international law is neither "concrete", nor "normative", nor can it find and occupy a space between the two – with "hegemony as a theory of the decision taken in [the] undecidable terrain" that deconstruction unveils.¹⁸⁶

Through "deconstruction" Koskenniemi reveals "the contingent character of the connections existing in [international law's] terrain."¹⁸⁷ He does this by, for example, showing that international legal doctrine on sovereignty and the sources of international law can be analysed with equal validity from opposing "ascending" and "descending" perspectives.¹⁸⁸ "Deconstruction" creates the space for sutured international lawyers to make legal arguments *qua* political decisions.¹⁸⁹ If the structure or discourse does not have the answer then international lawyers are free to make "contingent, precarious . . . pragmatic" political arguments within the discourse.¹⁹⁰

In making political decisions, in "aiming to act as . . . 'genuine republican[s]' encompassing the perspective of the whole,"¹⁹¹ international lawyers are "burden[ed] . . . with the impossible task of making [global] democratic interaction achievable."¹⁹² They are "hegemonic" precisely because they are "not closed in a

¹⁸⁰ Martti Koskenniemi, *What is International Law For?*, in INTERNATIONAL LAW 29, 46 (Malcolm D. Evans ed., 4d ed. 2014).

¹⁸¹ Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 119 (2005).

¹⁸² Koskenniemi, *A Reconfiguration*, *supra* note 179.

¹⁸³ Koskenniemi, *A Reconfiguration*, *supra* note 179, at 202.

¹⁸⁴ *Id.* at 214.

¹⁸⁵ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 6-14.

¹⁸⁶ Laclau, *Power*, *supra* note 131, at 90. I disagree with Sahib Singh, *International legal positivism and new approaches to international law*, in INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 291, 296-97 (Jörg Kammerhofer and Jean d'Aspremont eds., 2014), when he claims that KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, is a work of "structuralism" rather than "deconstruction," insofar as he implies an either / or relationship between structuralism and deconstruction.

¹⁸⁷ Laclau, *Power*, *supra* note 131, at 90.

¹⁸⁸ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, 224-302, 303-87 (chapters 4 and 5).

¹⁸⁹ Laclau, *Power*, *supra* note 131, at 92 ("the structure is not fully reconciled with itself . . . it is inhabited by an original lack . . . by a radical undecidability that needs to be constantly superseded by acts of decision").

¹⁹⁰ *Id.* at 90.

¹⁹¹ Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES IN LAW 9, 31 (2007).

¹⁹² Ernesto Laclau, *Universalism, Particularism and the Question of Identity*, in ERNESTO LACLAU, EMANCIPATION(S) 20, 35 (2007).

narrow corporatist perspective,”¹⁹³ not *wholly* apologetic for the current distribution of power, opportunity and wealth, “but [present themselves] as realizing the broader [utopian] aims either of emancipating or ensuring order for wider masses of the [global] population.”¹⁹⁴ It is in this sense international lawyers are, collectively, *The Gentle Civilizer of Nations*,¹⁹⁵ and, taking that as his title, Koskenniemi develops the argument for hegemonic practice further in his second book.

II. Structuralism, Synchrony, and the “move to history”

Koskenniemi tells us that *Gentle Civilizer* “move[s] from structure” – *From Apology*’s concern – “to history” through “intuitively plausible and politically engaged narratives about the emergence and gradual transformation of a profession that plays with the reader’s empathy,”¹⁹⁶ and by “infus[ing] the study of international law with a sense of historical motion and political, even personal, struggle.”¹⁹⁷ Another way to characterise the book would be to say that, consistent with *From Apology*’s concept of international law as a structure or discourse, *Gentle Civilizer* focuses on the “articulatory practice” of particular (sutured) subjects – Jellinek, Kelsen, Scelle, Lauterpacht,¹⁹⁸ for example – and that this is “a story of kings . . . and the achievements of the great,”¹⁹⁹ and quite deliberately not a story of the forgotten, ignored and marginalised.²⁰⁰

Consistent with *From Apology*’s understanding of international law as a synchronic “language . . . a total system . . . complete at every moment, no matter what happens to have altered a moment ago,”²⁰¹ we can read *Gentle Civilizer*’s various essays, on themes such as international legal practice in Germany in the period 1871-1933, as stories about past “kings”, past “gentle civilizers,” retold in order to “sharpen [the] . . . ability [of present day princes] to act in the professional contexts that are open to [them] as [they] engage in [or “suture” themselves into their] practices and projects.”²⁰²

The book’s “move from structure to history” is synchronic;²⁰³ it is dictated by *From Apology*’s structuralist understanding of international law “as a language.”²⁰⁴ If, as Jameson maintains, Saussurean, structuralist linguistics is synchronic rather than diachronic then any account of international law’s history, built out of an

¹⁹³ Ernesto Laclau, *Why do Empty Signifiers Matter to Politics?*, in ERNESTO LACLAU, EMANCIPATION(S) 36, 43 (2007).

¹⁹⁴ *Id.*

¹⁹⁵ KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6.

¹⁹⁶ *Id.* at 6, 10.

¹⁹⁷ *Id.* at 2.

¹⁹⁸ KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, 198-208 (on Jellinek), 238-49 (on Kelsen), 327-38 (on Scelle), 353-412 (on Lauterpacht).

¹⁹⁹ FREDRIC JAMESON, *THE ANTINOMIES OF REALISM* 111 (2013) (on “the dynastic tradition of history writing and historical narrative, which was essentially a story of the kings and queens and the achievements of the great, that is to say individuals, who are grasped in our own spirit of the word as the protagonists of historical actions and narratives”).

²⁰⁰ See KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, at 9 (“If all the protagonists in this book are white men, for instance, that reflects my concern to retell the narrative of the mainstream as a story about its cosmopolitan sensibilities and political projects . . . This should not, however, be read so as to exclude the possibility – indeed, the likelihood – that in the margins . . . there have been women and non-Europeans whose stories would desperately require telling so as to provide a more complete image of the profession’s political heritage”).

²⁰¹ JAMESON, *PRISON-HOUSE*, *supra* note 1, at 5-6.

²⁰² Koskenniemi, *GENTLE CIVILIZER*, *supra* note 6, at 10. See also Matt Craven, *Theorising the Turn to History in International Law*, in *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* 21, 34 (Anne Orford and Florian Hoffmann eds., 2016), rejecting diachrony as method:

international law is not simply something that one can examine through the lens of history as if it were some historical artefact existing independently of the means chosen by which it is to be represented, but a field of practice whose meaning and significance is constantly organised around, and through the medium of, a discourse that links present to past.

²⁰³ KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, at 6.

²⁰⁴ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 568.

understanding of international law “as a [synchronic] language,”²⁰⁵ will synchronise “individual events [in]to various manifestations of some basic idea . . . so that what at first seemed a series of events in time at length turns out to be a single timeless concept in the process of self-articulation.”²⁰⁶ *Gentle Civilizer’s* “single timeless concept” emerges out of the story of a May 1966 debate between Professors A.J. Thomas, Adolf Berle and Wolfgang Friedmann.²⁰⁷ In Koskenniemi’s hands the story is an allegory. Themes and tensions that permeate international law’s history play out in interactions between its characters, and Koskenniemi extracts a moral from it, using that moral to synchronise the individual essays into a coherent book.²⁰⁸

The debate concerned the legality of US military intervention in the Dominican Republic. For Thomas “[t]he purpose of the rule against intervention [in a foreign state] was to protect ‘the liberty and self-determination of a people,’” values that could not be protected “[o]nce the communists control a government”.²⁰⁹ It followed that US military intervention was lawful, in particular because communist “infiltration” of the internal uprising amounted to an “armed attack.”²¹⁰ Berle argued in favour of US military intervention despite the lack of UN Security Council authorisation or a credible self-defence argument,²¹¹ but Friedmann insisted that “there are norms of international law. If we wish to ignore them, then let us say frankly that international law is of no concern to us. But don’t let us pretend that we argue in terms of international law, when in fact we argue in terms of power or ideology.”²¹²

Koskenniemi maintains that Friedmann was “well aware of the shades of grey in all legal argumentation,”²¹³ well aware, recalling the discussion of *Hegemony and Socialist Strategy* above, of the contingent, articulatory nature of legal practice. Analysing Friedmann’s position, Koskenniemi emphasises that “differential [legal] positions” can be “articulated within,” but not outwith, “[the] discourse”.²¹⁴

Perhaps what Friedmann finds objectionable is the nonchalance with which Thomas and Berle treat his profession, the (to him) self-evident hypocrisy that accompanied their reasoning and

²⁰⁵ *Id.*

²⁰⁶ JAMESON, PRISON-HOUSE, *supra* note 1, at 70.

²⁰⁷ KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 497-501.

²⁰⁸ See FREDRIC JAMESON, THE ANTINOMIES, *supra* note 199. His observations on Alfred Döblin’s method, in his novel *Wallenstein*, seem equally applicable to Koskenniemi’s method, with money as Döblin’s moral and formalism as Koskenniemi’s:

filled at every moment with names, with all the characters of history, some known, some only mentioned in passing: and with place names as well, not even the map is enough to accommodate them all. It is a pulsing interminable uninterrupted flow, true textuality (not mere form without content) in which everything is in perpetual change back and forth across Central Europe yet driving forward temporally so that time itself, the passing instants, become invisible, only the events are generated and they never stop, the writer never stops (he thereby disappears also), and the sources are so thoroughly used up that nothing is any more allusion . . . there can be no longer any competition with this unending flow of text but only the affect the pulses through it and changes color from pallor to flush . . . all the tonalities of the affective spectrum stream through the interminable moments, none of them truly fulfilled or effectuating any lasting pause or destiny . . . Not the least interest of this novel is indeed the recurrence in the form of an allegorical habit . . . Everything here . . . has to do with money, and with an immense coral polyp that refuses to starve or die away but keeps itself in life for unforeseeable years by the very strength with which it draws money out of its hiding place . . . Wealth then becomes the very conduit of energy itself.

JAMESON, *id.*, at 244-45.

²⁰⁹ KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 497 (quoting A.J. Thomas and Ann Van Wynen Thomas, *The Dominican Republic Crisis 1965. Legal Aspects*, in A.J. THOMAS, ANN VAN WYNEN THOMAS & JOHN CAREY, THE DOMINICAN REPUBLIC CRISIS 3, 26-27 (1966)).

²¹⁰ *Id.*

²¹¹ *Id.* at 497-98.

²¹² *Id.* at 499 (quoting A.J. THOMAS, ANN VAN WYNEN THOMAS & JOHN CAREY, THE DOMINICAN REPUBLIC CRISIS 113 (1966)).

²¹³ *Id.*

²¹⁴ LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 105.

that seemed to fatally undermine the profession's faith and integrity. Indeed, it may have seemed to him that what Thomas and Berle were doing was not part of legal discourse at all.²¹⁵

Thomas and Berle break "the chain" that binds the subject to "its discourse,"²¹⁶ and that break is the source of the objection Koskenniemi expresses allegorically through Friedmann.²¹⁷ Friedmann is a "stand-in," an ideal-typical international lawyer *qua* sutured subject, who "take[s] the place" of *the* subject, the "profession," within international law's structure / discourse.²¹⁸

The allegory of the May 1966 debate is the "nodal point," the "*point de capiton*," of *Gentle Civilizer* and of Koskenniemi's work as a whole.²¹⁹ A collection of "privileged signifiers" – the arguments advanced by Thomas, Berle, and Friedmann – "[collectively] fix the meaning of [the] signifying chain" that runs through *From Apology* and *Gentle Civilizer*,²²⁰ "partially fix[ing] [the] meaning" of international legal practice in the process.²²¹ For Koskenniemi, and under the banner of the "culture of formalism . . . the story of international law from Rolin to Friedmann" – from the foundation of the *Institut de droit international* in 1873 by Gustave Rolin-Jaequemyns and the other "men of 1873" to Friedmann's 1966 rejection of Thomas' and Berle's political pragmatism – "does have coherence."²²² It is the story of an attempt to serve, in the *passé* language of 1873, as "the 'legal conscience . . . of the civilized world'";²²³ of attempts to sustain "a practice that builds on formal arguments that are available to all under conditions of equality . . . insist[ing] that absent the possibility of building social life on unmediated love or universal reason, persuading people to bracket their own sensibilities and learn openness for others, is not worthless."²²⁴

"What at first seemed a series of events in time" – *Gentle Civilizer's* apparently disparate historical essays – "turns out to be a single timeless concept in the process of self-articulation."²²⁵ If the "culture of formalism" *looked* as though it had been articulated by Koskenniemi, if it *looked* like an "intellectual construction" produced out of "comparisons between one moment of lived time and another by someone who stands outside" international law,²²⁶ it would appear diachronic and lose the quality of seeming internal to international law's discourse. By *apparently* emerging out of "a series of events in time" at the end of *Gentle Civilizer*, the "culture of formalism" *seems* to articulate itself. Crucially, however, behind this "self-articulation"

²¹⁵ KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, at 499.

²¹⁶ Miller, *supra* note 128, at 93.

²¹⁷ Koskenniemi's objection, *via* Friedmann, to Thomas and Berle seems to echo Freud in the sense captured by Caudill, *supra* note 14, at 661 ("Freud believed that the primordial and dangerous passions of the individual must be controlled by inherently oppressive social structures"). See also Anne Orford, *A Journal of the Voyage from Apology to Utopia* (2006) 7(12) GERMAN L.J. 993, 995 (2006) ("I was struck . . . by the ease with which Koskenniemi accepts, even embraces, the constraints of institutional life").

²¹⁸ Miller, *supra* note 128, at 93.

²¹⁹ See *supra* section C. I., "Hegemony" (on "nodal point" / "*point de capiton*").

²²⁰ LACLAU AND MOUFFE, *HEGEMONY*, *supra* note 155, at 112.

²²¹ *Id.* at 113.

²²² KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, at 502 (on the "culture of formalism"), 39-41 (on the *Institut's* foundation in 1873). See Andrew Lang and Susan Marks, *People with Projects: Writing the Lives of International Lawyers*, 27 TEMPLE INT'L & COMP. L.J. 437, 446 (2016) ("Martti sees the founders of the *Institut de droit International* and their twentieth century successors as exemplifying and enacting in their professional lives some version of the kind of responsible moral agency which he seeks to enliven in the practice of international lawyers today").

²²³ *Id.* at 41. The phrase still features in Article 1(2)(a) of the Statute of the *Institut*. STATUTES OF THE INSTITUT DE DROIT INTERNATIONAL, <http://justitiaetpace.org/status.php>, last visited June 7 2016.

²²⁴ KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, at 501, 502. See also Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 498 ("To struggle for 'world peace through law', 'world order models', the rights of future generations, 'fairness' or indeed global governance is far from a recipe for diplomatic success. But we would not recognize the profession for what it is if it did not hark back to such objectives").

²²⁵ JAMESON, *PRISON-HOUSE*, *supra* note 1, at 170 (emphasis added).

²²⁶ *Id.* at 6

lurks Koskenniemi's *a priori* preference, expressed (covertly) in *From Apology*, for the synchronic over the diachronic. "[T]he decision as to whether one faces a break or a continuity,"²²⁷ the choice between synchrony and diachrony, between "whether the present is to be seen as a historical originality or as the simply prolongation of more of the same under different sheep's clothing,"²²⁸ is pure rather than "empirically justifiable or philosophically arguable . . . since it is itself the inaugural narrative act that grounds the perception and interpretation of the events to be narrated."²²⁹ If the choice between synchrony and diachrony is not "justifiable" then, methodologically, the best course of action is to use the fabric of the text to cover over the fact that you have chosen one over the other. To do this the text must be structured so as to make your choice seem natural and uncontroversial. This explains why the "culture of formalism" *appears* to articulate itself and why, despite being Koskenniemi's core message, he only introduces it at the end of his second book.

Gentle Civilizer does not, then, "move from structure to history,"²³⁰ insofar as that implies an opposition between structure and history. The book is, rather, a structuralist-synchronic history of international law, and it needs to be read as such.²³¹ I will return to the possibility of choosing diachrony over synchrony as the foundation of an alternative theory of international law and its practice in the final part of this article. For now, I simply want to emphasise the fact a choice between synchrony and diachrony exists.

III. "Empty" Universalism

The "culture of formalism" is an argument for an "'empty' . . . negative" universalism that "avoids the danger of imperialism" by being 'recognisable . . . only in terms of its opposition to something that it is not.'²³² Whilst "Thomas and Berle saw politics as a clash of incompatible particularities – 'identity politics' . . . Friedmann kept open the space for something beyond the merely particular,"²³³ for an "empty" universalism.

Koskenniemi derives his non-imperialist, "empty", formal universalism from Laclau,²³⁴ and it recurs throughout his work.²³⁵ For Laclau hegemony is a political practice in pursuit of an unrealisable universal. The process of Italian unification that began in the nineteenth century, for example, is not so much a "concrete political

²²⁷ JAMESON, POSTMODERNISM, *supra* note 17, at xii-xiii

²²⁸ *Id.* at xii.

²²⁹ *Id.* at xiii.

²³⁰ KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 6.

²³¹ Compare George Galindo's review of *Gentle Civilizer* and his conclusion that it "represents a historiographical turn in the work of Koskenniemi and paves the way for the same in the field of international law." George Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR. J. INT'L L. 539, 542 (2005).

²³² KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 504.

²³³ *Id.* at 501.

²³⁴ *Id.* at 505-8 (footnotes 307-11). Justin Desautels-Stein, *Chiastic law*, *supra* note 29, reads Koskenniemi's "culture of formalism" through Søren Kierkegaard's figure of the 'Knight of Faith', emphasising the extent to which Koskenniemi's formalism involves "having faith in a universal that is at once impossible and realisable." *Id.* at 288. The Laclauian-Lacanian reading offered here has, I claim, "priority" – on "priority" see *supra* part I, "Introduction" – over Desautels-Stein's reading.

²³⁵ See e.g. Koskenniemi, *Constitutionalism as Mindset*, *supra* note 191, at 31 (arguing that the international lawyer *qua* "moral politician" is "the actor conscious that the right judgment cannot be reduced to the use of instrumental reason and who, in judging, aims to act as a 'genuine republican'"); Martti Koskenniemi, *"The Lady Doth Protest Too Much": Kosovo, and the Turn to Ethics in International Law*, 65 MODERN L. REV. 159, 174 (2002) ("formalism constitutes a horizon of universality, embedded in a culture of restraint, a commitment to listening to others' claims and seeking to take them into account"); Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 30 (2007) ("the tradition of international law has often acted as a carrier of what is perhaps best described as the regulative idea of universal community, independent of particular interests or desires. This is Kant's cosmopolitan project rightly understood: not an end-state or party programme but a project of critical reason that measures today's state of affairs from the perspective of an ideal of universality that cannot be reformulated into an institution, a technique of rule, without destroying it"); Martti Koskenniemi, *International Law in Europe*, *supra* note 181, at 120, 122-23.

programme” as “the name or . . . symbol of a lack,”²³⁶ and the process is capable of sustaining Italian politics “over a period of centuries ” because it is built around that “constitutive lack”²³⁷

Hegemonic practices are attempts to resolve “the openness of the social,” “to fill in” or “suture” fractures in the social fabric.²³⁸ Because “a closure of the social is . . . impossible” hegemonic practices are more attempts than achievements,²³⁹ efforts to articulate ways in which society might be changed without any real prospect that this will achieve a “totally sutured society . . . where this filling-in would have reached its ultimate consequences.”²⁴⁰

Koskenniemi uses formalism as a euphemism for hegemony. He presents his argument for international legal practice as hegemony in the abstract,²⁴¹ in the footnotes.²⁴² The term “formalism” seems somehow more consonant with international legal discourse than “hegemony,” more consistent with the suture between the international lawyer and his discourse.²⁴³

The hegemonic practice of international law within international legal discourse sustains the “authentic[ity]” and “integrity” of international law,²⁴⁴ creating “a continuity operating through partial discontinuities” that counterbalances “the openness of the social” by keeping the fractures,²⁴⁵ the “fissure[s],”²⁴⁶ within manageable bounds. For Koskenniemi international law’s value, as a hegemonic practice, does not lie in any particular achievement or track-record of success but in its status as an open, “empty” space of articulation in which “the common good of humankind [is] not reducible to the good of any particular institution . . . ‘regime’ [or particularity]”.²⁴⁷

²³⁶ Ernesto Laclau, *Subject of Politics, Politics of the Subject*, in ERNESTO LACLAU, EMANCIPATION(S) 47, 63 (2007).

²³⁷ *Id.*

²³⁸ LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 88 (endnote 1).

²³⁹ *Id.*

²⁴⁰ *Id.* See also Ernesto Laclau, *Structure, History and the Political*, in JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ŽIŽEK, CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT 182, 199 (2000) (“instead of . . . impossibility leading to a series of substitutions which attempt to supersede it, it leads to a symbolization of impossibility as such as a positive value”).

²⁴¹ Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx?*, 17 LEIDEN J. INT’L L. 229 (2004). Koskenniemi notes, in the article’s abstract, that “[t]he task . . . is to move from doctrinal critique to progressive practice” and that “the theory of hegemony provides the best available account of how that can be undertaken without losing the ambition of the law’s universality.” *Id.* at 229. Koskenniemi does not, however, directly advocate the practice of international law as hegemony in the article’s main text. See also Martti Koskenniemi, *Law’s Negative Aesthetic: Will it Save Us?*, 41(10) PHILOSOPHY AND SOCIAL CRITICISM 1039 (2015) (summarising the argument for the practice of international law as hegemony without presenting it as an argument for hegemonic practice); Martti Koskenniemi, *What is Critical Research in International Law? Celebrating Structuralism*, 29 LEIDEN J. INT’L L. 727 (2016) (arguing, in abstract terms, for an understanding of research in international law as an exercise in hegemonic intervention: “Structural research of the kind displayed in [From Apology] tries to keep alive the political intuitions of the researcher by demonstrating that there really is no safe ground of ‘mere professionalism’ where attitudes of blasé neutrality would be appropriate. On the other hand, by making express the rules that provide for legal competence, such research seeks to empower the critical researcher to operate in actually existing institutions in potentially influential ways, aware of the structural constraints but also of the malleability, gaps and loopholes of their official rhetoric.” *Id.* at 734).

²⁴² Koskenniemi, “*The Lady Doth Protest*”, *supra* note 235, at 174 (footnote 51), referring to and linking LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, and JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ŽIŽEK, CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT (2000), with his discussion of the “culture of formalism” in KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6.

²⁴³ On “suture” see *supra* section B. V., “Structure / subject / suture.”

²⁴⁴ KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 546 (advocating “authentic commitment “to international law”); KOSKENNIEMI, *id.*, at 555 (on “integrity”).

²⁴⁵ Laclau, *Identity and Hegemony*, *supra* note 124, at 78; LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 88 (endnote 1).

²⁴⁶ LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 8

²⁴⁷ *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi*, International Law Commission, 58th Sess., U.N. Doc. A/CN.4/L.682, at 244 (para. 480).

international law's formalism . . . brings political antagonists together as they invoke contrasting understandings of its rules and institutions. In the absence of agreement over, of knowledge of, the "true" objectives of political community – that is to say, in an agnostic world – the pure form of international law provides the shared surface – the *only* such surface – on which political adversaries recognize each other as such and pursue their adversity in terms of something shared, instead of seeking to gain full exclusion – "outlawry" – of the other. In this sense, international law's value and its misery lie in its being the fragile surface of political community among social agents . . . who disagree about their preferences but do this within a structure that invites them to argue in terms of an assumed universality.²⁴⁸

So conceived, "law becomes a partial cure for the traumas of society, in a fashion not dissimilar to that applied to individuals in therapy."²⁴⁹ If psychoanalysis is a talking therapy then international law, for Koskenniemi, is a "speaking" therapy,²⁵⁰ a way of articulating *some*-things after we (international lawyers) have realised that we cannot articulate *every*-thing, that we have been (metaphorically) castrated.²⁵¹

IV. Necessity / Impossibility / "three endeavours"

Building on the discussion thus far, this section considers the place of what Laclau describes as "the double condition of necessity and impossibility" in Koskenniemi's work.²⁵²

Laclau explores the formal "necessity" of pursuing the concretely "impossible" through hegemony by outlining "three endeavours," each central to the construction of "hegemonic articulatory logics."²⁵³ My aim in this section is to show that Koskenniemi engages in each of these endeavours in pursuit of an "intellectual strategy" that is designed to establish,²⁵⁴ first, that international law is a Laclauian discourse and second, that the making of international legal arguments involves, and throughout its history has involved, "articulatory practice" by sutured subjects.

The first "endeavour" involves "understand[ing] the logics by which each of the two dimensions [necessity and impossibility] subverts the other."²⁵⁵ *From Apology* understands the "subvert[ing]" relationship between necessity and impossibility in international law through the political / "normativity" vs. sociological / "concreteness" opposition. Whilst it may appear *necessary* for international law to find and occupy a space between these two domains, a "specifically 'legal' discourse,"²⁵⁶ finding and occupying that space is *impossible*. The impossibility of finding that space does not, however, make the search for it *unnecessary*. The search itself may be the product of the "myth" of a "specifically 'legal' discourse" but the fact that the search is mythical does not mean that international law can stop searching. Whilst, therefore, "intellectual operations [which seek to distinguish international law from the sociological and the political] do not leave room for any

²⁴⁸ Koskenniemi, *What is International Law For?*, *supra* note 180, at 48.

²⁴⁹ DOUZINAS, *supra* note 4, at 305.

²⁵⁰ KOSKENNIEMI, *FROM APOLOGY*, at 567-68 ("The descriptive thesis in *From Apology to Utopia* . . . seeks to articulate the competence of native language-speakers of international law . . . Native language speakers of, say, Finnish, are also able to support contrasting political agendas without the question of the genuineness of their *linguistic* competence ever arising" (paragraph breaks suppressed, footnotes omitted). See also DOUZINAS, *supra* note 4, at 308-9 ("Speaking leads to a truce, rivalry is abandoned in order to participate in discourse and share our imaginary scenarios or symbolic representations with the other. But speech is a lie, a denying negating, deferring discourse which places the love-object, death and its desire, (temporarily) in abeyance. But this lie is also the whole truth").

²⁵¹ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 19, at 13 ("By providing an 'insider's view' to legal discourse, such an approach might produce a therapeutic effect on lawyers frustrated with their inability to cope with the indeterminacy of theory and the irrelevance of doctrine").

²⁵² Laclau, *Identity and Hegemony*, *supra* note 124, at 75.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 1.

specifically legal discourse,”²⁵⁷ “[t]he structure of international legal argument” is defined by the “dynamics of [the] contradiction” between “normativity” and “concreteness.”²⁵⁸

This leads into the second of Laclau’s “endeavours,” which involves “look[ing] at the political productivity of [the] mutual subversion [of necessity and impossibility] – that is, what it makes possible to understand about the working of our societies which goes beyond what is achievable by unilateralizing either of the two poles.”²⁵⁹ International law needs to be understood as a “grammar,”²⁶⁰ as a “discourse,”²⁶¹ rather than as a “specifically ‘legal’ discourse,”²⁶² precisely because finding and occupying the space “between the sociological and the political” is a necessary impossibility *and* an impossible necessity.²⁶³ That the occupation of such a space is impossible does not mean that the idea of that space is not existentially necessary to international law *qua* discourse. Equally, the fact that the search for that space is necessary to the discourse of international law does not make it possible to actually find that space.

It is in this sense that international law lives with(in) its neurosis, with(in) a search for a “specifically ‘legal’ discourse” that is as necessary as it is futile. International law “get[s] over” its neurosis,²⁶⁴ and lives within its myth, by recognising the necessary impossibility *and* the impossible necessity of the search – a move, as discussed above, that *From Apology* argues for – but that does not abolish the myth or cure the neurosis.

The idea of a “specifically ‘legal’ discourse” is a mythical “constitutive lack” at the heart of international law;²⁶⁵ something that constitutes and structures the discourse by its absence. It designates a gap in the structure of the discourse which cannot be sutured by hegemonic, “articulatory practice,” but which creates the space for that practice. Abolishing the myth of a “specifically ‘legal’ discourse” or ending the neurotic search for sociological *and* political validation would abolish the “constitutive lack” and, consequently, destroy international legal discourse *qua* discourse.

The “constitutive lack” of a place “between the sociological and the political” in *From Apology* translates into the “empty” universalism of *Gentle Civilizer* because hegemonic, “articulatory practice” within a discourse is incompatible with any concrete, universal programme:

It is only as long as the ideal social order remains formal that it can accommodate autonomy and community and be acceptable. Immediately as it is given concrete content – as soon as it becomes a programme of what to do – it will appear to overrule somebody’s preferred substantive view and seem illegitimate as such.²⁶⁶

This is consistent with Laclau’s Italian unification example, quoted above.²⁶⁷ Hegemonic “formalism projects the universal community as a standard – but always an unachieved one,”²⁶⁸ because:

²⁵⁷ *Id.* at 58.

²⁵⁸ *Id.* (sub-heading 1.3).

²⁵⁹ Laclau, *Identity and Hegemony*, *supra* note 124, at 75.

²⁶⁰ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 11 (“it [*From Apology*’s “deconstructive study of legal argument” – *id.* at 10] seeks to make explicit the legal “grammar” which controls the production of particular arguments within discourse and which counts for the lawyers specific legal ‘competence’”).

²⁶¹ Laclau, *Identity and Hegemony*, *supra* note 124, at 76 (using “grammar” as a synonym for “discourse”).

²⁶² KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 1.

²⁶³ *Id.*

²⁶⁴ Aristodemou, *supra* note 1, at 37.

²⁶⁵ See Laclau, *Subject of Politics*, *supra* note 236, at 63 (on “constitutive lack”).

²⁶⁶ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 484.

²⁶⁷ See text accompanying *supra* note 237.

[t]he fullness of society is an impossible object which successive contingent contents try to impersonate through catachrestical displacements. This is exactly what hegemony means. And it is also the source of whatever freedom can exist in society: no such freedom would be possible if the 'fullness' of society had reached its 'true' ontic form.²⁶⁹

The third "endeavour" involves "trac[ing] the genealogy of this undecidable logic [between necessity and impossibility], the way it was already subverting the central texts of our political and philosophical tradition."²⁷⁰ *From Apology* "trace[s] the genealogy of [the] undecidable logic" of necessity and impossibility, mapping the interaction between necessary, "ascending," concrete, apologetic and impossible, "descending," utopian arguments across the core "categories of classical" international legal thought,²⁷¹ from "[s]overeignty" to "[s]ources" and "[c]ustom."²⁷² *From Apology* "[conceives] of [those "categories"] . . . as objects *presupposed* by hegemonic articulatory logics."²⁷³ It does not "flat[ly] reject" them because of their "undecidable logic",²⁷⁴ because they can be approached with equal validity from "ascending" and "descending" perspectives. It treats each category as an aspect of a discourse that is structured so as to demand articulatory, hegemonic decision-making by its practitioners.

Gentle Civilizer, likewise, "trace[s] the genealogy of [the] undecidable logic" of "the culture of formalism." Perhaps Hersch Lauterpacht's early to mid-twentieth century moderate, "modernist," "utopian federalism" was, ultimately, just a bit too utopian,²⁷⁵ and perhaps it is no longer possible to "ha[ve] no doubt about the universal and intrinsically beneficent character of legal reason."²⁷⁶ But, for Koskenniemi, that does not mean that Lauterpacht's "Victorian tradition" of "political commitment" and a "consistent attempt to maintain, through projection, the wholeness of a social world and [a] personal identity" lacks contemporary relevance.²⁷⁷ And perhaps Hans Kelsen, by cutting law off from "its relationship to the surrounding world,"²⁷⁸ went too far in his attempts to establish a "pure theory" but, for Koskenniemi, that does not mean that his efforts can be ignored or dismissed: "Since Kelsen, lawyers have looked for professional identity in a middle ground between that which is sociological description (of what works) and that which is moral speculation (of what would be good)."²⁷⁹

Gentle Civilizer argues that international law is, and always has been, an "undecidable," unsuturable logic – a Laclauian discourse – whose future depends, and always has depended, on subjects suturing themselves into

²⁶⁸ KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, at 508.

²⁶⁹ Laclau, *Identity and Hegemony*, *supra* note 124, at 79.

²⁷⁰ *Id.* at 75.

²⁷¹ *Id.* ("with the need to assert both sides – necessity and impossibility – I could hardly be in disagreement, for it is the cornerstone of my own approach to hegemonic logics – the latter not involving a flat rejection of categories of classical political theory such as 'sovereignty', 'representation', 'interest', and so on, but conceiving of them, instead, as objects *presupposed* by hegemonic articulatory logics but, however, always ultimately unachievable by them").

²⁷² KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 224, 303, 388.

²⁷³ Laclau, *Identity and Hegemony*, *supra* note 124, at 75

²⁷⁴ *Id.*

²⁷⁵ KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, at 357.

²⁷⁶ *Id.* at 412.

²⁷⁷ *Id.* at 376, 412. See also Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90 at 498 ("The hopes of the reconstructive scholarship of the inter-war era as well as the projects for peaceful settlement and collective security within the League of Nations were easily dashed by Fascist aggression. Though tragedy is the name we apply to that period, we still admire the heroism of the profession's leading names: Anzilotti, Kelsen, Lauterpacht, Scelle . . . their belief in public governance through international institutions and the pacifying effects of interdependence remain part of the professional ethos today").

²⁷⁸ KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, at 249.

²⁷⁹ *Id.* at 494.

the discourse and making political choices through hegemonic, “articulatory practice.”²⁸⁰ It makes that argument through a synchronic history of the discipline; a history that tells the discipline what it now is by explaining how it has always been this way.

The aim, in this section, has been to demonstrate the Laclauian character of Koskenniemi’s argument. This moves us closer to the core argument of this article – that Koskenniemi’s work can and should be read as a Lacanian psychoanalysis of international law(yers) – but, to demonstrate the ultimate dependence of Koskenniemi’s Laclau-inspired argument for the hegemony of the international lawyer on Lacanian psychoanalytic theory, the relationship between Laclau and Lacan needs to be addressed directly.

V. *Laclau and Lacan ... and Koskenniemi*

Lacan’s political theory of hegemony is largely based on Laclau’s psychoanalytic theory.²⁸¹ Like Lacan, Laclau insists on the “primacy of the signifier.”²⁸² Language and “articulation” are the focus of hegemonic politics because they are the means by which our social reality is formed: “The bar in the relation *S/s* is the very precondition of a primacy of the signifier without which hegemonic displacements would be inconceivable.”²⁸³

Lacanian psychoanalysis and Laclauian “hegemonic analysis” are concerned with truth rather than meaning,²⁸⁴ whilst insisting on the unachievability of any fixed truth:

The ultimate point which makes an exchange between Lacanian theory and the hegemonic approach to politics possible and fruitful is that in both cases, any kind of unfixedity, tropic displacement, and so on, is organized around an original lack which, while it imposes an extra duty on all processes of representation – they have to represent not just a determinate ontic content but equally the principle of representability as such – also, as this dual task cannot but ultimately fail in achieving the suture it attempts, opens the way to a series of indefinite substitutions which are the very ground of a radical historicism.²⁸⁵

The foundations of Laclau’s political theory of hegemony lie in Lacanian psychoanalysis. The truth of any subjectivity – the truth of who or how someone, like the Rat Man, is – is understood through the structure in which they were formed and into which they have been “sutured.” That structure exists in language, in the signification of roles or qualities – wife / mother / sociology / concreteness / apology, or father / politics / friend / lover / normativity / utopia – and the recounting of stories about a father’s gambling, a mother’s riches, or a May 1966 debate in New York.

The aim of Lacanian psychoanalysis and Laclauian hegemonic politics is not to reconstruct the present out of the past (diachrony) but to explain the possibilities of present action within pre-formed structures (synchrony). Psychoanalysis cannot “perfect” the Rat Man’s life, and we cannot uncastrate ourselves, but we can shed “light” on our situation and find progressive ways to act if we psychoanalyze our situation, our structural position.²⁸⁶ Hegemony, in this sense, is a psychoanalytic-structuralist theory of political praxis.

²⁸⁰ LACLAU AND MOUFFE, *HEGEMONY*, *supra* note 155, at 105.

²⁸¹ See Laclau, *Identity and Hegemony*, *supra* note 124, at 71; STAVRAKAKIS, *LACAN AND THE POLITICAL*, *supra* note 118; YANNIS STAVRAKAKIS, *THE LACANIAN LEFT: PSYCHOANALYSIS, THEORY, POLITICS* (2007).

²⁸² Hewitson, *supra* note 119.

²⁸³ Laclau, *Identity and Hegemony*, *supra* note 124, at 68-69. Laclau, *id.*, reproduces Lacan’s representation of the signifier / signified relationship in Lacan, *The Instance of the Letter in the Unconscious*, *supra* note 112, at 414, with the ‘S’ above the ‘s’. The ‘S’ and ‘s’ are placed side by side in the quotation above for typographical reasons only.

²⁸⁴ *Id.* at 69 (“In Lacan’s words, the psychoanalytic process is concerned not with meaning but with truth . . . The importance of this disassociation of truth from meaning for hegemonic analysis is that it enables us to break with the dependence on the signified to which a rationalist conception of politics would have otherwise confined us”).

²⁸⁵ *Id.* at 71.

²⁸⁶ See Lacan, *Myth*, *supra* note 47, at 425 (“more light”). See also Aristodemou, *supra* note 14, at 37 (“[Lacanian psychoanalysis] requires the annihilation of the fantasies and misrecognitions that the patient used to rely on, and the constitution of a new, perhaps less confident

Koskenniemi's message is that an understanding of the structures which condition and create the subjectivity of the international lawyer can secure the future of international legal practice, just as an appreciation of the reasons for his neurotic behaviour – his elaborate scheme to repay the debt – makes it possible for the Rat Man to continue with his life. An accommodation with or understanding of your structure as *your* structure guarantees continued life (within the structure), and, in this sense, the future of international law depends on synchronisation with its past.²⁸⁷

VI. *The Psychoanalysis of International Law*

Summarising the analysis and argument thus far, Koskenniemi's work should be read as a psychoanalysis of international law / the international lawyer because, by applying Laclau's Lacanian political theory of hegemony, described by Laclau and Mouffe in terms of the maintenance of a coherent, modernist political practice in the turbulence of the post-Cold War era,²⁸⁸ it keeps the "modernist . . . charismatic,"²⁸⁹ quasi-"heroi[c]" international lawyer alive despite his / international law's near-fatal contradictions, flaws and anxieties.²⁹⁰ It does this without curing his neurosis, and without resolving the fundamental contradictions in international law's basic structure, just as psychoanalysis kept the Rat Man alive without uncastrating him / his father (see section B. II., "Lacan and the Rat Man").

For some international lawyers it may be enough that they are (professionally) alive.²⁹¹ I disagree. Maybe I, *qua* international legal academic, have suicidal tendencies,²⁹² a "death instinct,"²⁹³ but my point, foreshadowed in the introduction and developed in the final part of this article, is that it is time to euthanize the image of the modernist international lawyer *qua* quasi-hero that Koskenniemi has kept alive. Before developing this argument, however, one final, fundamental question about the relationship between Koskenniemi's work and Lacan needs to be addressed.

and arrogant, but also . . . a truer and more ethical subject"); Jacques Lacan, *Discourse analysis and ego analysis*, in *THE SEMINAR OF JACQUES LACAN: BOOK I, FREUD'S PAPERS ON TECHNIQUE 1953-1954* 62, 67 (Jacques-Alain Miller ed., John Forrester trans., 1988) ("Nothing other than this is at stake in analysis – recognising what function the subject takes on in the order of the symbolic relations which covers the entire field of human relations"); Koskenniemi, *Celebrating Structuralism*, *supra* note 241, at 728 ("One type of 'structural' analysis that arose in the twentieth century aimed to make explicit the rules of production of . . . 'there-ness', the sense in which we end up feeling that something is so 'true' that we allow it to determine the way we live. According to this type of analysis, of which [*From Apology*] is a specimen, learning to know how such 'truths' are produced would release us of their power so as to take action in order to deal with problems that otherwise seemed intractable (because they were based on 'truths') and allows us to lead in some sense better lives").

²⁸⁷ See Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 *TEMPLE INT'L & COMP. L.J.* 215, 216 (2013) ("what seems needed is a better understanding of how we have come to where we are now"). See also *id.* at 238 ("The turn to contextual readings of international law marks a welcome advance from the older search for origins and the progressive accounting of international doctrines that accompanied traditional histories . . . Nevertheless, there was something valuable in the sweeping normativity of older histories, in the way they sought to produce "lessons" from their narratives. A careful reconstruction of the context cannot be all. Critical history must also examine how those contexts were formed and to what extent they have persisted to make the world into what it has become today"). On the importance of tradition and the passage of time in international law see Nicholson, *supra* note 20.

²⁸⁸ LACLAU AND MOUFFE, *HEGEMONY*, *supra* note 155, at vii-xix.

²⁸⁹ JAMESON, *PRISON-HOUSE*, *supra* note 1, at 306.

²⁹⁰ Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 497 ("a commitment, distinguished from mere "work", has an aspect of heroism in that it works against all odds").

²⁹¹ See Caudill, *supra* note 14, at 661 (noting that a Freudian psychoanalytic perspective "may be helpful in social analysis . . . [but] invite[s] pessimism and provides the basis for an implied conservatism rather than for a radical or utopian critique of the status quo").

²⁹² See Jon Mills, *Reflections on the Death Drive*, 23 *PSYCHOANALYTIC PSYCHOLOGY* 373, 375 (2006) ("A logical claim can be advanced that life is only possible through the force of the negative that brings about higher developmental achievements through the destruction of the old . . . Psychoanalysts are often confused by viewing death as merely a physical end-state or the termination of life, when it may be memorialized in the psyche as a primary ontological principle that informs the trajectory of all psychic activity" (footnote omitted)).

²⁹³ Sigmund Freud, *Beyond the Pleasure Principle*, in *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD VOLUME XVIII (1920-1922)* 7, at 38-41, 44, 46-47, 49-57, 60 (James Strachey trans., 1955) (1920). See also SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 55 (James Strachey ed., Joan Riviere trans., 1982) ("besides the instinct to preserve living substance and to join it into ever larger units, there must exist another, contrary instinct seeking to dissolve those units and to bring them back to the primaeval, inorganic state. That is to say, as well as Eros there was an instinct of death").

VII. Reality Affects and the “lack” of Lacan

That final and fundamental question is this: How is it possible to read Koskenniemi’s work as a Lacanian psychoanalysis of international law, as this article has, given: (i) the lack of Lacan’s name in Koskenniemi’s texts, and; (ii) the absence of deliberate concealment by Koskenniemi of Lacan’s place in his work (which I am not suggesting)?

Lacan provides the answer to (i): “every discourse derives its effects from the unconscious.”²⁹⁴ Lacanian psychoanalysis is, in Jameson’s terms, the “political unconscious” of Koskenniemi’s work, its “hidden master narrative” and the “hidden narrative” of its “master” (Koskenniemi).²⁹⁵ It is because Lacan is an “unconscious” presence, a “constitutive lack” – someone present in Koskenniemi’s texts for all that (the reader thinks) he is not there – that Koskenniemi’s work has been so “effect[ive].”

To *tell* international law / international lawyers that it / they are being psychoanalyzed – to reveal that in the text, rather than concealing it in the subtext – would make the whole exercise ineffectual.²⁹⁶ It / they may not, after all, consent to the analysis and, even if it / they did, they may not want to read the analyst’s report. Without telling it / him what he is doing, the analyst / master “initiates the one still in ignorance into the dimension of fundamental . . . relationships” through psychoanalysis by “open[ing] . . . what one might call the way to moral consciousness.”²⁹⁷ He *shows* the analysand / patient the structure within which he exists through a process of “self-articulation” (on “self-articulation” see section C. II., “Structuralism, synchrony and the ‘move to history’”) in which the analysand / patient self-articulates their structure as *their* structure (see section B. II., “Lacan and the Rat Man”), suturing themselves into it in the process (see II E., “Structure / subject / suture,” above).²⁹⁸

Koskenniemi’s process of “showing” rather than “telling” produces a reality “affect”;²⁹⁹ it *affect-ively* makes the image of international law and the (sutured) identity of the international lawyer it produces and advocates – commitment to hegemonic practice within a linguistic structure, the “culture of formalism” – seem (really) real, seem more than the (mere) image or “fiction” it (really) is.³⁰⁰ In *The Antinomies of Realism* Fredric Jameson considers the production of reality “affect” as a technique or style in literary realism associated, in

²⁹⁴ Lacan, *Subversion*, *supra* note 63, at 701.

²⁹⁵ JAMESON, POLITICAL UNCONSCIOUS, *supra* note 24, at 13.

²⁹⁶ See *id.* at 68.

²⁹⁷ Lacan, *Myth*, *supra* note 47, at 407-8.

²⁹⁸ The necessity of “self-articulation” and self-suturing – of *showing* the international lawyer his structure rather than *telling* him about it – explains why Koskenniemi does not adopt Jason Beckett’s position and insist on formalism as “the *only competent way* in which [international law] may be spoken or practiced.” Beckett, *supra* note 9, at 1079.

²⁹⁹ JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 21-26 (on “showing” and “telling”), 36, 70 (on “affect”).

³⁰⁰ According to Jameson:

we must think our way back into a situation in which th[e] question [of fiction / non-fiction] makes no sense and in which . . . the distinction between fiction and nonfiction (or history) does not yet obtain . . . postmodernity as such has now rendered those distinctions obsolete

JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 253. Jameson also observes:

In the postmodern, where the original no longer exists and everything is an image, there can no longer be any question either of the accuracy or truth of representation . . . where the true is ontologically absent, there can be nothing false or fictive either: such concepts no longer apply to a world of simulacra, where only the names – Lacan’s “*points de capiton*” . . . – remain.

Id. at 293. See also Lacan, *Subversion*, *supra* note 63, at 684 (“Thus Truth draws its guarantee from somewhere other than the Reality it concerns: it draws it from Speech. Just as it is from Speech that Truth receives the mark that instates it in a fictional structure”); Jacques Lacan, *Psychoanalysis and Its Teaching*, in JACQUES LACAN, *ÉCRITS* 364, 376 (Bruce Fink trans., 2006) (on “facticity” and the notion that “the truth brings out its fictional structure”).

particular, and not without relevance for international law given the foundation of the *Institut de Droit International* in 1873 and the significance that Koskenniemi attaches to that event in *Gentle Civilizer* (see section C. II., “Structuralism, synchrony and the ‘move to history’”), with “nineteenth-century realism.”³⁰¹

For Jameson “the realm of affect” involves “the ‘insurrection of the present against other temporalities.’”³⁰² The synchronic manifests this “insurrection” in its prioritisation of the present, of “the immediate lived experience of the native speaker,” over the diachronic’s emphasis on “comparisons between one moment of lived time and another” (see section B. III, “International law ‘as a language’”). Koskenniemi’s synchronic methodology, analysed throughout this article, can therefore be seen to exist within “the realm of affect.”

“Affect” itself is “resistan[t] . . . to language,” “a fleeting essence.”³⁰³ Affects are “nameless and unclassifiable”;³⁰⁴ anything that “means something” is not an affect.³⁰⁵ Affects are not “emotions” because “emotion is preeminently a phenomenon sorted out into an array of names” and names have “reifying effects” that turn sensations into named things.³⁰⁶ Affects are “characterized . . . in terms of physical sensation or sensory perception.”³⁰⁷ An affect is a “representational presence,”³⁰⁸ something which cannot be told or defined, something that is made real through representation and being shown. “At its outer limit, affect becomes the organ of perception of the world itself, the vehicle of my being-in-the-world,”³⁰⁹ an image of international law as “pure form.”³¹⁰

Koskenniemi’s work, from *From Apology* through *Gentle Civilizer* and beyond, is an exercise in producing a reality “affect.”³¹¹ That affect cannot be defined or captured in concepts or names but we come close to a direct encounter with it in the notion of the “culture of formalism.” Because it *shows* the reader the “culture of formalism” in practice, the allegorical story of the May 1966 debate between Thomas, Berle and Friedmann is, in my view, the “nodal point,” the “*point de capiton*” of Koskenniemi’s work (on which see section C. II., “Structuralism, synchrony and the ‘move to history’”); the single most important story or “element” in Koskenniemi’s work.³¹²

An affective methodology is closely related to the Lacanian concept of “the real, or what is perceived as such, [as] . . . [that which] resists symbolisation absolutely.”³¹³ The nature of “affect,” and of the Lacanian “real,” is

³⁰¹ JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 35.

³⁰² *Id.* at 10 (quoting and translating the title of ALEXANDER KLUGE, DER ANGRIFF DER GEGENWART GEGEN DIE ÜBRIGE ZEIT (1985)).

³⁰³ *Id.* at 31.

³⁰⁴ *Id.* at 33.

³⁰⁵ *Id.* at 33.

³⁰⁶ *Id.* at 30.

³⁰⁷ *Id.* at 35.

³⁰⁸ *Id.* at 35.

³⁰⁹ *Id.* at 43.

³¹⁰ Koskenniemi, *What is International Law For?*, *supra* note 180, at 48.

³¹¹ Koskenniemi makes a point about reality affects in relation to Philip Allott’s work:

[The] style simultaneously affirms and erases the authorial voice . . . A few lines of this text and every international lawyer will know who has written them. *Erasure*: but it is a voice that denies its own personality and seeks to rise above anything as superficial or flimsy as authorial. Where Roland Barthes famously analysed the *effet de réel* in literature, the power of the literary style – the style of ‘realism’ – to create the impression that reality itself spoke, Philip uses an *effet d’histoire* – an effect as if history itself were speaking in his writing.

Martti Koskenniemi, *International Law as Therapy: Reading the Health of Nations*, 16 EUR. J. INT’L L. 329, 333 (2005).

³¹² See LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 105 (“element”).

³¹³ Lacan, *Discourse analysis and ego analysis*, *supra* note 286, at 66. See also Macey, *supra* note 73, at xxvi (“the real . . . is not synonymous with external reality, but refers to the residual dimension that constantly resists symbolism and signification”).

such that you cannot (effectively) tell international lawyers who or what they real-ly, unconsciously are – you cannot symbolise or name them – but you can (affectively) *show* them.

That, in my view, is what Koskenniemi has done. His work shows that the reality of international law is an “affect” of its form but, precisely because it is an “affect,” you cannot (formally) tell anyone that.³¹⁴ His inquiry into “the real” of international law, into its “deep-structure,”³¹⁵ works on the basis of the production of reality “affects.” It has to show rather than tell because, as noted above, the real “resists symbolisation absolutely.” The reality “affect” that it produces is a “pure form,”³¹⁶ a “vehicle of . . . being-in-the-world,”³¹⁷ *qua* international legal form(alism).

International lawyers who refuse to accept Koskenniemi’s analysis, who remain immune to its reality “affect,” are, apparently, mistaken. They do not understand themselves: “les non-dupes errant” / “those who are not taken in err.”³¹⁸ Because they “are not taken in,” not “affected,” not “committed” to (formal) international law above all else, Thomas’ and Berle’s contributions to the May 1966 debate are mistaken (see section C. II., “Structuralism, Synchrony, and the ‘move to history’”). Similarly, “activists” who prioritise the pursuit of political causes through legal argument over their commitment to international law itself are, apparently, not real lawyers.³¹⁹

The “political” (Jameson’s term) “effect” (Lacan’s term) of Koskenniemi’s psychoanalysis “derives” (Lacan’s term) from its production of a reality “affect” (Jameson’s term),³²⁰ from the fact that it is done “unconsciously” (both Lacan and Jameson focus on the “unconscious”), and *via* “show” rather than “tell.” If “there is nothing that is not social and historical” and if “everything is ‘in the last analysis’ political” then Koskenniemi’s attempt to synchronise the history and present of international law, in a project designed to affectively delimit international law’s form, is “political.”³²¹ It achieves political effect – it influences the polity’s self-consciousness – by producing a reality “affect.” Ultimately, “the power of [Koskenniemi’s] text[s], with [their] hidden assumptions, lies in a suppression of [their] mode of production not unlike the ego’s repression of its own self-constructive processes.”³²²

Characterising the master’s / analyst’s process as a “political” move in which the patient / analysand is *shown* the benefits of psychoanalysis without consenting to it may seem to contradict my claim (in (ii), at the start of this section) that Koskenniemi has not deliberately concealed Lacan’s influence in his work. To overcome this apparent contradiction, we need to consider the links between Koskenniemi’s, David Kennedy’s and Duncan Kennedy’s work.

³¹⁴ See Haskell, *supra* note 29, at 667 (2016) (noting “[t]he irony . . . that while unquestionably a profoundly important text that bring to light central historical, methodological and theoretical problems confronting the discipline, it often does so inadvertently – in other words, it is exactly how these problems are circumvented, obscured, silenced in the text that brings them into focus” (footnote omitted)); Singh, *The Critic(al) Subject*, *supra* note 14, at 14 (“From Apology to Utopia presumed into existence the type of psychological and social subject that was desired and required by its author’s politics . . . without being seen to do so”).

³¹⁵ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 6.

³¹⁶ Koskenniemi, *What is International Law For?*, *supra* note 180, at 48.

³¹⁷ JAMESON, *THE ANTINOMIES OF REALISM*, *supra* note 199, at 43.

³¹⁸ See text accompanying *supra* notes 2 and 3.

³¹⁹ Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 518-21. Compare Rajagopal, *supra* note 22.

³²⁰ JAMESON, *POLITICAL UNCONSCIOUS*, *supra* note 24; Lacan, *Subversion*, *supra* note 63, at 701; JAMESON, *THE ANTINOMIES OF REALISM*, *supra* note 199, 36, 70 (on “affect”).

³²¹ JAMESON, *POLITICAL UNCONSCIOUS*, *supra* note 24, at 5

³²² Caudill, *supra* note 14, at 673.

1. “Theses,” “Commentaries,” and Apologies

In his 1980 “Theses about International Law Discourse” David Kennedy outlined an “*analytic* approach” to international law,³²³ a “style that could be labelled structuralist because it seeks to explain the current pattern of discourse and commentary and the interconnectedness of both doctrinal areas and conceptual schools by reference to their underlying structures.”³²⁴ Kennedy notes that this “style” is based in part on Saussure’s 1966 *Course in General Linguistics* and Levi-Strauss’s 1966 *The Savage Mind*,³²⁵ two works that Koskenniemi references when explaining that *From Apology* takes a similarly “analytic approach,” “argu[ing] . . . ‘backwards’ from explicit arguments to their ‘deep-structure.’”³²⁶ Neither Kennedy nor Koskenniemi subjects these major works to analysis, simply referring to them in footnotes.³²⁷

For Kennedy “international legal scholarship is in crisis” because “as the practice of international law has expanded, it seems to have become weaker.”³²⁸ This “crisis” and weakness are caused by “a conflict between the autonomy and cooperation of states,”³²⁹ reflecting what David Kennedy and Duncan Kennedy label “[t]he fundamental contradiction” between individual freedom and collective, social life.³³⁰ David Kennedy uses the term as a shorthand for the “basic quandary” in which the interests of “individual nations” and “other sovereigns” conflict,³³¹ acknowledging the origin of the concept in Duncan Kennedy’s 1979 article “The Structure of Blackstone’s Commentaries,”³³² whilst Duncan Kennedy uses it as shorthand for the fact “that relations with others are both necessary to and incompatible with our freedom.”³³³ “Blackstone’s Commentaries” outlines “a method for understanding the political significance of legal thinking, a method that might be called structuralist or phenomenological, or neo-Marxist, or all three together,”³³⁴ setting up a tension between ideas of law as “an instrument of apology” and “a utopian enterprise.”³³⁵ Legal analysis is, so the argument goes, inspired by a “utopian” motive which tries “to discover the conditions of social justice” yet simultaneously driven by an apologism that seeks to explain why things are and will remain the way they are.³³⁶

David Kennedy’s “Theses” translates Duncan Kennedy’s analytical approach to “American legal thought” for an international legal audience.³³⁷ International legal discourse’s “fundamental contradiction” has a “binary” structure: “there are two mutually exclusive possibilities which never exist without each other.”³³⁸ The

³²³ David Kennedy, *Theses about International Law Discourse*, 23 GERMAN YEARBOOK OF INT’L L. 353, 354 (1980).

³²⁴ *Id.* at 355 (footnote 4).

³²⁵ *Id.* at 355.

³²⁶ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 6.

³²⁷ See David Kennedy, *Theses*, *supra* note 323, at 355; KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 6, 8.

³²⁸ *Id.* at 356.

³²⁹ *Id.* at 362.

³³⁰ David Kennedy, *Theses*, *supra* note 323, at 361; Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 213 (1979).

³³¹ David Kennedy, *Theses*, *supra* note 323, at 361.

³³² *Id.* (footnote 9); Duncan Kennedy, *Blackstone’s Commentaries*, *supra* note 330.

³³³ Duncan Kennedy, *Blackstone’s Commentaries*, *supra* note 332, at 213.

³³⁴ *Id.* at 209.

³³⁵ *Id.* at 210.

³³⁶ *Id.* (“an instrument of apology – an attempt to mystify both dominators and dominated by convincing them of the ‘naturalness’, the ‘freedom’ and the ‘rationality’ of a condition of bondage”).

³³⁷ *Id.* at 209.

³³⁸ David Kennedy, *Theses*, *supra* note 323, at 364.

“contradiction” is also “transformational” in the sense that “positions . . . are connected in a particular way” with “[e]ach pole of the binary opposition seem[ing] to contain its opposite in some sense.”³³⁹

This “binary,” “transformational” analysis is echoed in Koskeniemi’s apology / utopia analytic, something he acknowledges in a footnote: “I have received the theme apology / utopia from [David Kennedy’s “Theses”] . . . article.”³⁴⁰ In another footnote he highlights the importance of “Blackstone’s Commentaries” as “the most influential” work on “[t]he strategy of ‘revealing’ contradictions within legal argument and tracing them back to more fundamental distortions in our ways to conceptualise human nature and social life,” without specifically highlighting the (apparent) origin of *From Apology*’s title in Duncan Kennedy’s article.³⁴¹

Whilst the connection between Koskeniemi’s, David Kennedy’s and Duncan Kennedy’s work is well charted in the literature,³⁴² the significance of that connection has not, to date, been fully articulated. Forensic analysis of the connections between the key texts (“Theses,” “Blackstone’s Commentaries,” *From Apology*) and related works by their authors is required to remedy this.

That analysis starts with recognition that *From Apology* is not only connected to David Kennedy’s ‘Theses’; it picks Kennedy’s project up where he left off, continuing it and adopting his methodology. In *From Apology*’s introduction Koskeniemi outlines a “deconstructive” methodology based on Saussure’s work which he then develops into an account of international law as a “discourse.”³⁴³ This reflects David Kennedy’s argument, supported with reference to Levi-Strauss and Saussure,³⁴⁴ that “concentration upon discourse and upon the hidden ideologies, attitudes and structures which lie behind discourse, rather than upon the subject matter of legal talk” is required.³⁴⁵

Kennedy maintains that “good arguments do not resolve the questions posed by legal cases;”³⁴⁶ Koskeniemi “[t]hat there is no real discourse going on within legal argument . . . but only a patterned exchange of argument.”³⁴⁷ For Kennedy “[o]ne may imagine law to be either critical of or grounded in state behaviour, and neither understanding of law is sufficient;”³⁴⁸ for Koskeniemi “international legal discourse cannot fully accept either of the justificatory patterns [“ascending” or “descending,” “concrete” or “normative]” and it therefore produces “an incoherent argument which constantly shifts between the opposing positions whilst remaining open to challenge from the opposite argument.”³⁴⁹

For Kennedy “practitioners . . . must act as though their discourse should be convincing without actually believing that they would be convinced were they to hear themselves;”³⁵⁰ for Koskeniemi international

³³⁹ *Id.* 364-65.

³⁴⁰ KOSKENIEMI, *FROM APOLOGY*, *supra* note 4, at 10 (footnote 7). *See also id.* at 107 (footnote 140).

³⁴¹ *Id.* at 62 (footnote 151). *See also* text accompanying *supra* note 335.

³⁴² *See, e.g.,* Lea Brilmayer, *From Apology to Utopia: The Structure of International Legal Argument*, 85 AMERICAN POLITICAL SCIENCE REVIEW 687 (1991); David Kennedy, *The Last Treatise*, *supra* note 5, at 982-83 (2006); Christoph Möllers, *It’s about legal practice, stupid*, 7(12) GERMAN L.J. 1011, 1013 (2006); Rasulov, *supra* note 13, at 649-51.

³⁴³ KOSKENIEMI, *FROM APOLOGY*, *supra* note 4, at 1-15 (and in particular at 7, 13).

³⁴⁴ David Kennedy, *Theses*, *supra* note 323, at 355 (footnote 4).

³⁴⁵ *Id.* at 355.

³⁴⁶ *Id.* at 358.

³⁴⁷ KOSKENIEMI, *FROM APOLOGY*, *supra* note 4, at 511-12.

³⁴⁸ David Kennedy, *Theses*, *supra* note 323, at 383.

³⁴⁹ KOSKENIEMI, *FROM APOLOGY*, *supra* note 4, at 60.

³⁵⁰ David Kennedy, *Theses*, *supra* note 323, at 387.

lawyers have to maintain a “commitment” to international law despite the very real and credible reasons which might lead them to lapse into “cynicism.”³⁵¹

Kennedy calls for “an alternative style of discourse aimed at revealing and resolving the dilemmas of social life, rather than hiding them or factoring them out of the discourse of law”;³⁵² Koskenniemi produces a theory of international legal practice as hegemony which tackles the dilemmas of social life through “empty” universalism (see section C. III., “‘Empty’ universalism”). Kennedy notes that, in “Theses,” he “confine[s] [him]self to a theoretical description of the patterns which seem responsible for indeterminacy” but that “[t]he next step . . . is to analyse a series of decisions and doctrines more rigorously,”³⁵³ and Koskenniemi takes that “next step,” analysing recurrent doctrinal and theoretical “patterns” throughout *From Apology*.

David Kennedy’s basic concept of international law as a “discourse” is arrived at by “crudely borrow[ing] from the field of structural linguistics” – from Saussure’s *Course in General Linguistics*.³⁵⁴ This generates a linguistic concept of international law as a “largely unconscious structure which both controls and permits communication by the choice and recognition of the variable contents according to fixed patterns.”³⁵⁵ For Kennedy this approach “can serve as the starting point for explanation of a theory of legal argument,”³⁵⁶ indeed, it seems to be Koskenniemi’s “starting point” in the introduction to *From Apology*.³⁵⁷ Kennedy expands, very modestly, on the concept of a “largely unconscious structure” in his 1985 “Critical Theory, Structuralism and Contemporary Legal Scholarship,”³⁵⁸ “barely acknowledge[ing] Lacan’s work” as “instructive for legal analysis,” as David S. Caudill puts it.³⁵⁹

Echoing David Kennedy’s notion of a “largely unconscious structure,” Koskenniemi focuses on the “deep-structure” of international legal discourse.³⁶⁰ That “structure” is captured in Koskenniemi’s apology (concrete) / utopia (normative) analytic or, in Kennedy’s terms, in “the contradiction . . . between consent based norms which must be externally validated (or implied from ‘objective’ facts) and external norms which must be subjectively justified and defined.”³⁶¹ This is a tension which, as Koskenniemi demonstrates in chapters five and six of *From Apology*, “cuts across all such traditional sources as treaties, custom, principles or the writings of judges or publicists.”³⁶²

2. *Rising and Falling*

David Kennedy’s concept of an “unconscious structure” mirrors Duncan Kennedy’s concept of a “legal consciousness.”³⁶³ Duncan Kennedy developed this concept in *The Rise and Fall of Classical Legal Thought* – a

³⁵¹ Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90.

³⁵² David Kennedy, *Theses*, *supra* note 323, at 391.

³⁵³ *Id.* at 367.

³⁵⁴ *Id.* at 374.

³⁵⁵ *Id.* at 375 (emphasis added).

³⁵⁶ *Id.* at 375.

³⁵⁷ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 1-15.

³⁵⁸ David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209 (1985-1986). See *id.* at 250 (footnote 96), 277, 282-83 (footnote 180) for references to Lacan. Kennedy, *id.*, is not included in the bibliographies of *From Apology* or *Gentle Civilizer* - KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 618-75; KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6, at 518-58.

³⁵⁹ Caudill, *supra* note 14, at 676, 679.

³⁶⁰ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 6.

³⁶¹ David Kennedy, *Theses*, *supra* note 323, at 370.

³⁶² *Id.*

³⁶³ Duncan Kennedy, *Blackstone’s Commentaries*, *supra* note 332, at 220; DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* xiv-xvii (2006).

book written in 1975,³⁶⁴ circulated at around that time within closed networks and Harvard Law School,³⁶⁵ but only published for a general audience in 2006 – and he deploys it in “Blackstone’s Commentaries.”

According to Duncan Kennedy, *Rise and Fall* influenced “students and young colleagues [who] entered directly into the effort to reconstruct the structural transformations of legal discourse,”³⁶⁶ including David Kennedy.³⁶⁷ Whilst he does not suggest that David Kennedy’s “Theses” was influenced by *Rise and Fall* and,³⁶⁸ similarly, David Kennedy does not cite *Rise and Fall* in “Theses,” for reasons set out in the preceding analysis, the idea of “reconstruct[ing] the structural transformations of legal discourse” permeates “Theses” and *From Apology*.

The parallels between Koskenniemi’s notion of a “deep-structure,”³⁶⁹ David Kennedy’s notion of a “largely unconscious structure,”³⁷⁰ and this definition, from Duncan Kennedy, of “legal consciousness” are striking:

legal consciousness [is] . . . an entity with a measure of autonomy. It is a set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest. The autonomy of legal consciousness is a premise; yet that autonomy is no more than relative.³⁷¹

The identification of a “legal consciousness” is predicated on the idea that “it is possible to isolate and describe the significant dimensions or aspects of the body of ideas through which lawyers experience legal issues.”³⁷² This is a “descriptive”, synchronic, analytical, “native speaker” approach to law.³⁷³ It analyses and describes a thing called law internally, through its language, ignoring and avoiding the possibilities and challenges of diachronic inquiry into law’s ontology, of inquiry into law from perspectives external to it.³⁷⁴

The point [in *Rise and Fall*] was not to convert the reader to belief in a theory called structuralism . . . Rather it was to take very specific ideas from the literatures of structuralism and critical theory, revise them as seemed appropriate, and use them to illuminate, hopefully, specific aspects of legal discourse.³⁷⁵

I want to focus on the notion of description here, given its psychoanalytic-linguistic connotations.³⁷⁶ To reveal those connotations I want to *almost* break the word apart into *de-scribe*. “Scribing” is, of course, the process

³⁶⁴ DUNCAN KENNEDY, *RISE AND FALL*, *supra* note 363, at vii.

³⁶⁵ *Id.* at vii-viii, xl.

³⁶⁶ *Id.* at xli.

³⁶⁷ *Id.* at xliii (footnote 41).

³⁶⁸ *Id.*

³⁶⁹ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 6.

³⁷⁰ David Kennedy, *Theses*, *supra* note 323, at 375.

³⁷¹ DUNCAN KENNEDY, *RISE AND FALL*, *supra* note 363, at 2.

³⁷² *Id.* at 3.

³⁷³ Duncan Kennedy, *Blackstone’s Commentaries*, *supra* note 332, at 220-21 (“what I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it.”). On synchrony and “native speaker” approaches see *supra* section B. III., “International law ‘as a language.’”

³⁷⁴ Rasulov, *supra* note 13, at 643, describes “the [*From Apology*] project [as one that] follows directly in the footsteps of what can be called the *study of the inner life of the law* tradition,” without tracing the internal or “inner” character of Koskenniemi’s work back to Duncan Kennedy’s thought.

³⁷⁵ Duncan Kennedy, *Blackstone’s Commentaries*, *supra* note 332, at xiv.

³⁷⁶ See Caudill, *supra* note 14, at 661 (“Whilst psychoanalysis can be viewed solely as an explanatory model for individual human behaviour, “it also contains the possibilities for an approach that analyses the mechanisms by which the social world enters into the experience of

of writing. “De-scribing” is, then, a process of un-writing, of getting inside the text, of “providing an ‘insider’s view.’”³⁷⁷ It involves extraction of “specific aspects of legal discourse,”³⁷⁸ its “deep-structure,”³⁷⁹ through a process of de-construction, of taking apart, which leads to an understanding of how the discourse fits together.

This is the analytic methodology advocated by Duncan Kennedy in *Rise and Fall*, applied by Duncan Kennedy in “Blackstone’s Commentaries,” translated for an international legal audience by David Kennedy in “Theses,” and “received” by Koskenniemi in *From Apology*.³⁸⁰ A review of the literature on psychoanalysis would seem to be an essential part of any inquiry into “legal consciousness,” but Lacan and Freud are absent from *Rise and Fall*’s bibliography,³⁸¹ and Duncan Kennedy defines “consciousness” without reference to their work:

Consciousness refers to the total contents of a mind, including images of the external world, images of the self, of emotions, goals and values, and theories about the world and self. I use the term only in this vague, all-inclusive sense. It defines the universe within which are situated the more sharply-delineated concepts that are the vehicles for analysis.³⁸²

This definition of “consciousness” in structuralist terms but without reference to Lacan, the principal theorist of structuralist psychoanalysis, reflects Caudill’s argument that “[c]ritical [t]heory and [s]tructuralism . . . are most often identified as the forerunners of critical legal scholarship,” obscuring the importance of psychoanalysis as one of the foundations of critical legal studies (CLS), despite the fact that “both [critical theory and structuralism] signal a latent role for psychoanalytic theory in critical legal studies.”³⁸³ If psychoanalysis features in CLS work only as “a series of suggestive traces” then,³⁸⁴ in a sense, this article produces a new reading of Koskenniemi’s CLS-inspired work by finding and linking those “traces.”

More generally, there is a cherry picking quality to Duncan Kennedy’s engagement with theory, methodology and philosophy.³⁸⁵ Kennedy explains “[t]he goal” of *Rise and Fall* as the “introd[uction of] critical theory and structuralism, including the Frankfurt School and . . . the work of Clause Levi-Strauss and Jean Piaget, into American jurisprudence and legal sociology.”³⁸⁶ Theodor Adorno, Max Horkheimer and Walter Benjamin, three of the Frankfurt School’s leading lights,³⁸⁷ are, however, absent from a bibliography that, at five pages, is brief

each individual, constructing the human ‘subject’ and reproducing itself through the perpetuation of particular patterns of ideology” (quoting STEPHEN FROSH, *THE POLITICS OF PSYCHOANALYSIS: AN INTRODUCTION TO FREUDIAN AND POST-FREUDIAN THOUGHT* 11 (1987)).

³⁷⁷ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 13.

³⁷⁸ DUNCAN KENNEDY, *RISE AND FALL*, *supra* note 363, at xiv.

³⁷⁹ KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 6.

³⁸⁰ *Id.* at 10 (footnote 7). See also *id.* at 567 (referring to “[t]he descriptive thesis in *From Apology to Utopia*”). Whilst Desautels-Stein, *Chiastic law*, *supra* note 234, at 681, notes that “[i]n [*From Apology*], Koskenniemi built a ‘classical’ structure of legal argument,” using “classical” in the sense of Duncan Kennedy’s *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT*, *supra* note 363. Desautels-Stein does not, however, save for repeated references to “classical legal thought,” develop the point or trace the deeper methodological connections between Duncan Kennedy’s work and Koskenniemi’s thought.

³⁸¹ DUNCAN KENNEDY, *RISE AND FALL*, *supra* note 363, 265-69.

³⁸² *Id.* at 27.

³⁸³ Caudill, *supra* note 14, at 662.

³⁸⁴ *Id.* at 676.

³⁸⁵ See Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEG. STUD. 1, 23 (1986) (noting a CLS “tendency,” which he associates with Duncan Kennedy, “to cite the theoretical origins of their positions in a very loose way”). Koskenniemi notes the “review” of CLS in Hunt, *id.*, without analysis or discussion. KOSKENNIEMI

I, *FROM APOLOGY*, *supra* note 4, at 63 (footnote 151).

³⁸⁶ DUNCAN KENNEDY, *RISE AND FALL*, *supra* note 363, at ix.

³⁸⁷ See SUSAN BUCK-MORSS, *THE ORIGIN OF NEGATIVE DIALECTICS* (1977).

to the point of absurdity given *Rise and Fall*'s ambitious "goal."³⁸⁸ Duncan Kennedy assumes that heterogeneous intellectual traditions – critical theory and structuralism – can be synchronically homogenised "in the analysis of law,"³⁸⁹ paying little attention to the distinct literatures that constitute each of those traditions.³⁹⁰

Duncan Kennedy's methodology advocates a structuralist concept of "consciousness" without reference to the literature on psychoanalysis, and an approach to theory, methodology and philosophy that is "vague" and homogenistically "all-inclusive."³⁹¹ Adopting that methodology, *via* David Kennedy's "Theses," Koskenniemi has, in *From Apology, Gentle Civilizer* and his later work analysed above, written what can and should be read as a Lacanian psychoanalysis of international law without referring to Lacan.

The roots of Koskenniemi's work in Duncan Kennedy's thought have been hiding in plain sight. The notion of a movement "from apology to utopia" is at the heart of Duncan Kennedy's *Blackstone's Commentaries* and forms the title of Koskenniemi's first book,³⁹² and they have both written books that include "Rise and Fall" in their titles.³⁹³ Whilst these might, at first glance, seem like insignificant, even trivial, coincidences or parallels, the analysis undertaken here reveals them to be anything but.

Koskenniemi has loomed large as the "master" of "critical" international legal scholarship and yet, because we have remained unconscious of the "priority" of a psychoanalytic reading of his work – something that this article aims to remedy – we have described or, at best, *de*-scribed international law.³⁹⁴ We lack the ability and reject the possibility of fundamentally changing or re-imageining international law precisely because we have focussed our energies on description.³⁹⁵ Our capacity to describe / *de*-scribe "legal consciousness" – our appreciation of and enthusiasm for "culture[s] of formalism" – has risen because our insight into the thinking that underpins that capacity has fallen. In recent debates on international legal theory, therefore, "les non-dupes errant" / "those who are not taken in [are seen to] err."³⁹⁶ The international legal scholar's job – my job – is (apparently) synchronic, not diachronic.³⁹⁷ It apparently involves the production of reality "affect[s]"

³⁸⁸ *Id.* at 265-69.

³⁸⁹ *Id.* at xiv.

³⁹⁰ *Id.* at xiv. See *supra* section B. III., "International law 'as a language,'" on synchrony. There is a general tendency in the literature on critical approaches to international law to synchronically homogenise structuralism and critical theory despite their distinctive natures. See, e.g., Singh, *International legal positivism*, *supra* note 186, at 299-300; Rasulov, *supra* note 13, at 655.

³⁹¹ DUNCAN KENNEDY, *RISE AND FALL*, *supra* note 363, at 27.

³⁹² See text accompanying *supra* notes 341 and 335.

³⁹³ DUNCAN KENNEDY, *RISE AND FALL*, *supra* note 363; KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 6 (the full title of *GENTLE CIVILIZER* being *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*).

³⁹⁴ See *supra* part I, "Introduction," on "priority."

³⁹⁵ As Hunt observes:

The heart of [Duncan] Kennedy's 'antagonism to philosophy' centres around the question of the abstract character of theory and philosophy. The objection against abstraction is that distancing and generalization sacrifices the particularity or specificity of reality. Thus, if the objective of thought is to understand and to change reality, 'abstraction' is seen as conflicting with this goal . . . Kennedy is asserting the view that only those elements of a discourse which are capable of participating in 'effective communication' are to count as knowledge. This is a perfectly plausible position *within* philosophy, but it neither abolishes philosophy nor does it overcome his primary objection to abstraction. 'Effective communication' is not free of abstraction, but rather it privileges those abstractions that are part of 'common sense' or ordinary discourse

Hunt, *The Theory of Critical Legal Studies*, *supra* note 385, at 27 (paragraph break suppressed). See Nicholson, *supra* note 20, on "re-imageination."

³⁹⁶ See text accompanying *supra* notes 2 and 3.

³⁹⁷ On synchrony and diachrony, and internal and external perspectives, see *supra* section B. III., "International law 'as a language.'"

through the *de*-description of international law's content from inside its structure, rather than any attempt to change that structure from the outside.³⁹⁸

3. *An Unconscious Language Structure*

To recap, and in summary, Koskeniemi's work is, for the reasons outlined in this section (C. VII), based on his adoption and application of David Kennedy's "analytic approach" in "Theses." It can and should be read as Lacanian for all of the reasons outlined throughout this article, but most especially because David Kennedy's and Koskeniemi's shared and fundamental notion of a "largely unconscious [international legal] structure,"³⁹⁹ "within which the problems which modern lawyers face, either in theory or in doctrine, are constituted,"⁴⁰⁰ originating out of Duncan Kennedy's concept of "legal consciousness," is synonymous with Lacan's twin claims that "every discourse derives its effects from the unconscious,"⁴⁰¹ and that "the unconscious is structured as a language."⁴⁰²

That synonymy is neither coincidental nor accidental – synonymy is not to be confused with similarity. It is a product of the fact that David Kennedy and Koskeniemi, drawing, ultimately, on Duncan Kennedy's work, base their inquiry into international law's structure on the intellectual foundations of Lacan's work, on Levi-Strauss' structuralist anthropology and Saussure's structuralist theory of linguistics (see parts II and III above).⁴⁰³ On this foundation Koskeniemi erects a theory of international legal practice, using Laclau's Lacanian theory of hegemony for support (see section C. V., "Laclau and Lacan . . . and Koskeniemi").

Like David Kennedy, Koskeniemi starts with Lacan's forebears – Levi-Strauss and Saussure – and comes (unlike Kennedy) to rely on Ernesto Laclau, one of Lacan's principal followers. The fact that he works with Lacan's major forebears and follower but not with Lacan himself is traceable to his adoption of Duncan Kennedy's methodology (see the immediately preceding section, "Rising and falling"). Koskeniemi's work can and should be read as a *de*-description of international law's (linguistic) "unconscious" that is (unconsciously) based on Lacan's insistence that "the unconscious is structured as a language" and that "words are the only material of the unconscious."⁴⁰⁴ Lacanian psychoanalysis is, for these reasons, the "political unconscious" of and "allegorical key" to Koskeniemi's work.⁴⁰⁵

D. PROGNOSIS

I. *Therapeutic Benefits: The Work of the "Master"*

I agree with Aristodemou that international law has largely overcome its late twentieth-century "apologetics, restorative rhetoric and self-abnegating excuses" to become "a ubiquitous presence in [early twenty-first century] global policy making," a "discourse that is 'hard to escape.'" ⁴⁰⁶ For me, unlike Aristodemou, however,

³⁹⁸ See Anne Orford, *In praise of description*, 25 LEIDEN J. INT'L L. 609 (2012); Martti Koskeniemi, *Celebrating Structuralism*, *supra* note 241, at 732 ("[t]he task of legal research would be to understand legal professionalism not just be examining what institutions say but what makes them *choose* from equally plausible alternatives the ones they do, and draw from them the conclusions they draw").

³⁹⁹ David Kennedy, *Theses*, *supra* note 323, at 375.

⁴⁰⁰ KOSKENIEMI, *FROM APOLOGY*, *supra* note 4, at 6.

⁴⁰¹ Lacan, *Subversion*, *supra* note 63, at 701

⁴⁰² Jacques Lacan, *Of Structure*, *supra* note 96.

⁴⁰³ Rasulov, *supra* note 13, at 649-51, maintains that *From Apology's* "intellectual genealogy" is not rooted in Duncan Kennedy's work but in "the French structuralist tradition" and, in particular, the work of Levi-Strauss and Michel Foucault. For the reasons set out in this section and, more generally, throughout this article, it is possible, *via* Lacan and psychoanalysis, to link "the French structuralist tradition" with Duncan Kennedy and critical legal studies more generally and, to that extent, I disagree with Rasulov.

⁴⁰⁴ *Id.*

⁴⁰⁵ JAMESON, *POLITICAL UNCONSCIOUS*, *supra* note 24, at 13.

⁴⁰⁶ Aristodemou, *supra* note 14, at 35-36 (quoting James Crawford and Martti Koskeniemi, *Introduction*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 1* (James Crawford and Martti Koskeniemi eds., 2012).

the “sudden embrace, adulation, and self-congratulation amongst and for public international lawyers” after a period of sustained, even neurotic, “diffidence and self-questioning,”⁴⁰⁷ is linked and even largely attributable to Koskenniemi’s Lacanian psychoanalysis of international law and its reality “affect” on international law(yers).

The International Law Commission’s work on the fragmentation of international law is perhaps the best example of the beneficial effect of Koskenniemi’s psychoanalytic therapy on international law’s state of mind and self-confidence. In response to a widespread, late-twentieth century belief that international law was fragmenting into disparate elements, each focussed on a distinct area of policy – human rights, the global environment, international trade, for example – the International Law Commission embarked on a study of fragmentation and possible responses to it.⁴⁰⁸

The latter stages of that study were led by Koskenniemi and he produced an “analytical study” – perhaps “psychoanalytical study” would have been more apt – explaining the study group’s conclusions.⁴⁰⁹ The “study” reads like an executive summary of *From Apology and Gentle Civilizer*.⁴¹⁰ Recalling the discussion of *Hegemony and Socialist Strategy* above (section C. I., “Hegemony”), it amounts to an affirmation of hegemonic practice as the response to “fault[s],” “fissure[s]” and fragmentation in the “normal historical development” international law had envisioned for itself.⁴¹¹

International law is, according to the “study”, not fragmented but a synchronic “language . . . a total system . . . complete at every moment”.⁴¹² “Although there may be disagreement among lawyers about just how the systemic relationship between the various decisions, rules and principles should be conceived, there is seldom disagreement that it is one of the tasks of legal reasoning to establish it.”⁴¹³ Legal practice is a political endeavour, fashioning coherence out of the seemingly incoherent:

Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose . . . it may . . . be rationalized in terms of a *political obligation* on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer.⁴¹⁴

The “good” served by legal reasoning is, consistent with the “culture of formalism,” an “empty” universal. Hence the “principle of systemic integration” in Article 31(3)(c) of the Vienna Convention on the Law of Treaties:⁴¹⁵

⁴⁰⁷ *Id.* at 36.

⁴⁰⁸ See Martineau, *supra* note 13 (for an overview of fragmentation and the ILC’s work).

⁴⁰⁹ *Report of the International Law Commission on the work of its fifty-eighth session*, U.N. GAOR, 61st Sess., supplement No. 10, at 402 (para. 237), U.N. Doc A/61/10 (2006) (“The Study Group ... emphasized that [its] conclusions had to be read in connection with the analytical study, finalized by the Chairperson [Martti Koskenniemi], on which they are based”).

⁴¹⁰ *Report of the Study Group*, *supra* note 247. See also Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553 (2002), foreshadowing the outcome of the ILC’s work in its conclusion that whilst “no overall solution” is available to resolve fragmentation anxieties “consensual formalism” is the way forward. *Id.* at 578, 579.

⁴¹¹ My reading of the ILC’s fragmentation work as consistent with Koskenniemi’s work in general conflicts with the existing literature. See Sahib Singh, *The Potential of International Law: Fragmentation and Ethics*, 24 LEIDEN J. INT’L L. 23 (2011). Singh, *id.*, suggests there is an inconsistency between Koskenniemi’s scholarly work and the ILC study; Maksymilian Del Mar, *Systems values and understanding legal language*, 21 LEIDEN J. INT’L L. 29 (2008). Del Mar, *id.*, critiques the ILC study for ‘taking “the law itself” as an object’, arguing for an approach based on ‘the use of the language of law as a resource in the exercise of judgement’. Del Mar, *id.*, at 34, 48. See also Broude, *supra* note 13; Murphy, *supra* note 13 (Broude and Murphy point to but do not fully explore the connection between Koskenniemi’s scholarship and his ILC fragmentation work).

⁴¹² JAMESON, PRISON-HOUSE, *supra* note 1, at 5-6.

⁴¹³ *Report of the Study Group*, *supra* note 247, at 23 (para. 33).

⁴¹⁴ *Id.* at 24 (para 35), (footnote omitted).

⁴¹⁵ Vienna Convention on the Law of Treaties, art. 31(3), opened for signature May 23 1969) 1155 U.N.T.S. 331 (“There shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties”).

The principle of systemic integration . . . looks beyond the individual case. By making sure that the outcome is linked to the legal environment, and that adjoining rules are considered . . . any decision also articulates the legal-institutional environment in view of substantive preferences, distributionary choices and political objectives . . . Without the principle of “systemic integration” it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institutions or ‘regime’.⁴¹⁶

Koskenniemi’s psychoanalytic approach to international law was uniquely well-equipped to address the “phallic” nature of fragmentation. As Deborah Luepnitz explains, “Lacan observed that many human beings use the penis to cover their pervasive sense of bodily lack, and so he chose the term ‘phallus’ to refer to our wish for completeness. The phallus therefore signifies, paradoxically, the opposition of completeness – that is, lack.”⁴¹⁷ Fragmentation is international law’s “phallic” complex – an expression of its unfulfillable “wish for completeness” – and it gave the (Lacanian) “master” the perfect opportunity to demonstrate his mastery.

II. Utopian “archaeologies of the [international legal] future.”⁴¹⁸

In this article I have undertaken a diachronic analysis of Martti Koskenniemi’s work,⁴¹⁹ an “intellectual [re]construction” of his writings from the “outside.”⁴²⁰ I have tried to avoid the perspective of the “dupe,” to be one of “les non-dupes,” to resist the master’s reality “affect,” without “err[ing]” by “dismiss[ing] [international law’s] . . . symbolic texture” – its discourse – “as a mere semblance,” and without being “blind to its efficacy . . . to the way we can intervene into the Real through [international law’s] symbolic [discourse].”⁴²¹

A synchronic methodology, a psychoanalytic *de*-scription of the subject’s place within his structure,⁴²² reproduces the fundamental structures of the past in an “eternal present.”⁴²³ Past and present are synchronised in a denial of even the possibility of a future; a denial of any future that is not synchronic with a present which demands that the past synchronise with it, in an “insurrection of the present against [all] other temporalities.”⁴²⁴

Koskenniemi’s psychoanalytic, structuralist, synchronic account of international law is, therefore, in the most fundamental, ontological-methodological sense, a denial of the possibility of significant change in the structure of international law.⁴²⁵ It is erotic; it is in love with the structures and myths of international legal discourse,

⁴¹⁶ Report of the Study Group, *supra* note 247, at 244 (para. 480).

⁴¹⁷ Deborah Luepnitz, *Beyond the phallus: Lacan and feminism*, in THE CAMBRIDGE COMPANION TO LACAN 221, 226 (Jean-Michel Rabaté ed., 2003).

⁴¹⁸ See FREDRIC JAMESON, ARCHAEOLOGIES OF THE FUTURE: THE DESIRE CALLED UTOPIA AND OTHER SCIENCE FICTIONS (2007).

⁴¹⁹ See *supra* section B. III., “International law ‘as a language.’”

⁴²⁰ JAMESON, PRISON-HOUSE, *supra* note 1, at 6.

⁴²¹ ŽIŽEK, LESS THAN NOTHING, *supra* note 3, at 971:

from a properly Lacanian standpoint, *les non-dupes errant* means [that] . . . the true illusion consists not in taking symbolic semblances as real, but in substantializing the Real itself, in taking the Real as a substantial In-itself and reducing the symbolic to a mere texture of semblances. In other words, those who err are precisely those cynics [see Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90] who dismiss the symbolic texture as a mere semblance and are blind to its efficacy, to the way the symbolic affects the Real, to the way we can intervene in the Real through the symbolic.

⁴²² See *supra* section C. VII. 2, “Rising and falling” (on “*de*-scription”).

⁴²³ JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 24, 26, 28, 39–41 (discussing, at 39–41, Richard Wagner’s compositional style and the “Wagnerian ‘endless melody’”).

⁴²⁴ *Id.* at 10 (quoting and translating the title of ALEXANDER KLUGE, DER ANGRIF DER GEGENWART GEGEN DIE ÜBRIGE ZEIT (1985)).

⁴²⁵ JAMESON, ARCHAEOLOGIES OF THE FUTURE, *supra* note 418, at xii (“to adapt Mrs Thatcher’s famous dictum, there is no alternative to Utopia, and late capitalism seems to have no natural enemies . . . What is crippling is not the presence of an enemy but rather the universal belief . . . that no other socio-economic system is conceivable, let alone practically available”). See also Kotiaho, *A Return to Koskenniemi*,

with an image of the international lawyer as a sutured hegemon,⁴²⁶ and with (what it sees as) the beautiful truth of international law.⁴²⁷ The notion that Koskenniemi's work takes us on a "voyage" towards utopia must, therefore, be rejected.⁴²⁸ His work, in common with fundamental trends in late-twentieth and early-twenty-first century thought that accept capitalism as *the* final system, has effectively abandoned a (diachronic) future and the possibility of (legal-)utopian visions of it.⁴²⁹

The most urgent project in international legal thinking is, in my view, a recovery of the "utopian impulse,"⁴³⁰ an "archaeology" of international law's future,⁴³¹ a diachronic construction of international law's future using "fragments" of the past.⁴³² That recovery is impossible for so long as the international lawyer *qua* hegemonic subject remains alive as *the* subjectivity that international lawyers are required or expected to adopt when they suture themselves into international legal discourse.⁴³³

Diachrony and the recovery of the "utopian impulse" imply anti-erotic, destructive, anti-structuralist, anti-hegemonic,⁴³⁴ anti-discourse kinds of thinking; a process of "intellectual construction" out of the "ruins,"⁴³⁵ the

supra note 26, at 494 (asking whether "Koskenniemi's project is an attack [on international law] at all," answering "[n]o", and linking "[t]he left-wing international legal project" with an appreciation that "from behind the corner of theoretical eclecticism, one can already hear the co-optive song of the sirens of global capitalism").

⁴²⁶ See Freud, *Pleasure Principle*, *supra* note 293, at 42-43 ("the efforts of Eros to combine organic substances into ever larger unities"); *id.* at 50 ("the Eros of the poets and philosophers which holds all living things together"), at 46 ('Eros, the preserve of all things'); *id.* at 54 ("Eros, the preserver of life").

⁴²⁷ See WALTER BENJAMIN, *THE ORIGIN OF GERMAN TRAGIC DRAMA* 31 (John Osborne trans., 1998) (written in 1925) ("If truth is described as beautiful, this must be understood in the context of the Symposium with its description of the stages of erotic desires. Eros – it should be understood – does not betray his basic impulse by directing his longings towards the truth; for truth is beautiful: not so much in itself, as for Eros").

⁴²⁸ See Orford, *A Journal of the Voyage from Apology to Utopia*, *supra* note 217.

⁴²⁹ See JAMESON, *ARCHAEOLOGIES OF THE FUTURE*, *supra* note 418, at xii. Compare Lang and Marks, *supra* note 222, at 447-48: "[Koskenniemi's] project is not one of revival, but one of renewal and reimagination." Whatever (limited) possibility Koskenniemi's "project" holds for "renewal and reimagination" is, as argued throughout this article, limited to what can be achieved by hegemonic legal practice by "sutured" subjects situated within an international legal discourse defined by a synchronic history of its present, and it is this ontology of international law which, I argue, needs to be challenged. Lang and Marks seem to cautiously acknowledge the need for such a challenge but their reservations about Koskenniemi's "project" are rooted in the "voluntarism" they associate with his work. By contrast, my analysis of structure, hegemony and suture in Koskenniemi's work has sought to demonstrate the predominantly anti-voluntarist character of Koskenniemi's (on my reading) psychoanalytic-structuralist scholarship: "[Koskenniemi] has sought to recapture what he takes to have been an earlier commitment to responsible moral agency. We have noted that in a different time and place and in a different disciplinary context, E.P. Thompson likewise evoked the moralized sensibility of an earlier epoch . . . [through] veneration of heroic agency and self-creation . . . The poetry of voluntarism is certainly an inspiring art. What is less certain is how well it equips us to pursue the kinds of projects that might one day make us authors of our collective mode of existence as a whole." *Id.* at 453. See also Haskell, *supra* note 29, at 675 ("the miscalculation in [From Apology's] polemic to the profession is that it misses out . . . on the extra-linguistic rhetorical practices required to protect and expand intellectual terrain").

⁴³⁰ *Id.* at 8.

⁴³¹ JAMESON, *ARCHAEOLOGIES OF THE FUTURE*, *supra* note 418.

⁴³² WALTER BENJAMIN, *ORIGIN*, *supra* note 427, at 29 ("The value of fragments of thought is all the greater the less direct their relationship to the underlying idea, and the brilliance of the representation depends as much on this value as the brilliance of the mosaic does on the quality of the glass paste"). See also Nicholson, *supra* note 20 (on Benjamin and "fragments").

⁴³³ See Haskell, *supra* note 29, at 676 (protesting against current formulations of the international lawyer's subjectivity by calling on international lawyers to "[leave] the humanist impulse to moralize, to speak of transhistorical sensibilities, to confine ourselves as lawyers to the role of mediating professional differences or political hostilities, and instead to seek out the ruthlessly anti-transcendental, almost inhuman mechanisms that rein us into subjectivities").

⁴³⁴ See Balakrishnan Rajagopal, *Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy*, 27 *THIRD WORLD Q.* 767, 780 (2006) ("we must start by fundamentally rethinking the shibboleths of the past, especially those that have provided the language of emancipation and justice").

⁴³⁵ WALTER BENJAMIN, *ORIGIN*, *supra* note 427, at 235 ("In the ruins of great buildings the idea of the plan speaks more impressively than in lesser buildings").

“fragments” of the collapsing structure,⁴³⁶ in opposition to erotic labours-of-love that synchronically re-enforce it.⁴³⁷ It is time to think positively about collapse into “the void,”⁴³⁸ about death as re-birth.⁴³⁹ It is time to think against our identity as “native language-speaker[s] of international law,”⁴⁴⁰ against ourselves.⁴⁴¹ Only after the death of the image of international law’s much venerated “*Gentle Civilizer[s]*,” past and present, will we be able to make “progress and [secure] the production of new [international legal] forms.”⁴⁴² To build any future worth the name we must first rediscover (legal) means of imagining one.⁴⁴³

Fuseli’s *Artist Moved by the Grandeur of Ancient Ruins* shows a figure in a state of utter dejection dwarfed and enclosed by selected bits of a colossus, which though larger and more powerful than he, is in its dismemberment equally ineffectual. The past is conceived as a figure or being, now reduced to abstraction or monstrosity. The artist is part and not part of the collapse: his posture echoes the cascading form familiar in many scenes of ruin, but for all his solidarity with the fallen giant he remains apart, neither buried nor assimilated, revelling now in a fit of melancholy which will pass.⁴⁴⁴

⁴³⁶ JAMESON, PRISON-HOUSE, *supra* note 1, at 6 (“intellectual construction”). See also WALTER BENJAMIN, THE ARCADES PROJECT 460 (N1a,8) (Howard Eiland and Kevin McLaughlin trans., 2002) (“the rags, the refuse – these I will not inventory but allow, in the only way possible, to come into their own: by making use of them”). Freud develops an analogy between the mind and urban architecture. FREUD, CIVILIZATION AND ITS DISCONTENTS, *supra* note 293, at 6-8. He also asks, with reference to Plato, whether “living substance at the time of its coming to life was torn apart into small particles, which have ever since endeavoured to reunite through the sexual instincts” and whether “these splintered fragments of living substance . . . [having] attained a multicellular condition . . . finally transferred the instinct for reuniting, in the most highly concentrated form, to the germ-cells.” FREUD, *id.*, at 52. Walter Benjamin, writing in 1925 (Freud writes *Civilization* in 1920), explores the unification of fragments in “mosaic[s]” and within a platonic framework of base “phenomena,” mediating “concepts,” and “ideas.” WALTER BENJAMIN, ORIGIN, *supra* note 427, 29, 30-32, 33-34. See also, on Benjamin’s Platonism, Beatrice Hanssen, *Philosophy at Its Origin: Walter Benjamin’s Prologue to the Ursprung des deutschen Trauerspiels* 110 MODERN LANGUAGE NOTES 809 (1995). Žižek contemplates a “return to Plato” with reference to Plato’s “Idea” and on the basis that “everything that appears ultimately appears out of nothing.” ŽIŽEK, LESS THAN NOTHING, *supra* note 3, at 41, 37. Nicholson, *supra* note 20, contemplates a negative theory of international law and international legal practice based on Benjamin’s platonic framework.

⁴³⁷ See Mills, *supra* note 292, at 378 (“Under the pressure of disturbing external forces, a drive becomes an urge or pulsion to repeat itself, the motive of which is to return to an earlier state of undifferentiation, the ‘expression of the inertia inherent in organic life’ . . . Because drives are ‘conservative,’ that is, they follow a conservative economy of regulatory energy, are acquired historically and phylogenetically in the species . . . Freud speculates that an ‘elementary living entity’ would have no desire to change, only to maintain its current mode of existence” (quoting Freud, *Pleasure Principle*, *supra* note 293, at 36, 38).

⁴³⁸ ŽIŽEK, LESS THAN NOTHING, *supra* note 3, at 3-4 (commenting, with reference to Galileo’s famous “*Eppur si muove*”, “‘moving’ is the striving to reach the void, namely ‘things move,’ there is something instead of nothing, not because reality is in excess in comparison with mere nothing, but because reality is *less than nothing*. This is why reality has to be supplemented by fiction: to conceal its emptiness”). See also *id.* at 60 (“‘Nothing’ is the generative void out of which othings, primordially contracted pre-ontological entities, emerge”).

⁴³⁹ See Mills, *supra* note 292, at 379 (“According to Freud, all living organisms die for ‘internal reasons,’ that is, death is brought about from the cessation of internally derived activity: death is not merely executed by an extraneous force, rather it is activated by endogenous motives . . . the psyche is given determinate degrees of freedom to ‘follow its own path to death’ . . . that is, to bring about its end fashioned by its own hands. But this end is actually a return to its beginning, a recapturing, a recapitulation or its quiescent inorganic immediacy” (quoting Freud, *Pleasure Principle*, *supra* note 293, at 38, 39).

⁴⁴⁰ KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 568.

⁴⁴¹ THEODOR W. ADORNO, NEGATIVE DIALECTICS 365 (E.B. Ashton trans., 2007) (1966) (“if thinking is to be true – if it is to be true today, in any case – it must also be a thinking against itself”). On “thinking against” in international law see Nicholson, *supra* note 20.

⁴⁴² Freud, *Pleasure Principle*, *supra* note 293, at 37 (“in addition to the conservative instincts which impel towards repetition, there may be other which push forward towards progress and the production of new forms”). See also *id.* at 57-58 (“The pleasure principle [or Eros] seems actually to serve the death instincts. It is true that it keeps watch upon stimuli from without, which are regarded as dangers by both kinds of instincts; but it is more especially on guard against increases of stimulation from within, which would make the task of living more difficult . . . We must be ready . . . to abandon a path that we have followed for a time, if it seems to be leading to no good end. Only believers, who demand that science shall be a substitute for the catechism they have given up, will blame an investigator for developing or even transforming his views”).

⁴⁴³ See Nicholson, *supra* note 20.

⁴⁴⁴ Robert Harbison, *Ruins*, in ROBERT HARBISON, THE BUILT, THE UNBUILT AND THE UNBUILDABLE: IN PURSUIT OF ARCHITECTURAL MEANING 99, 108 (1991).